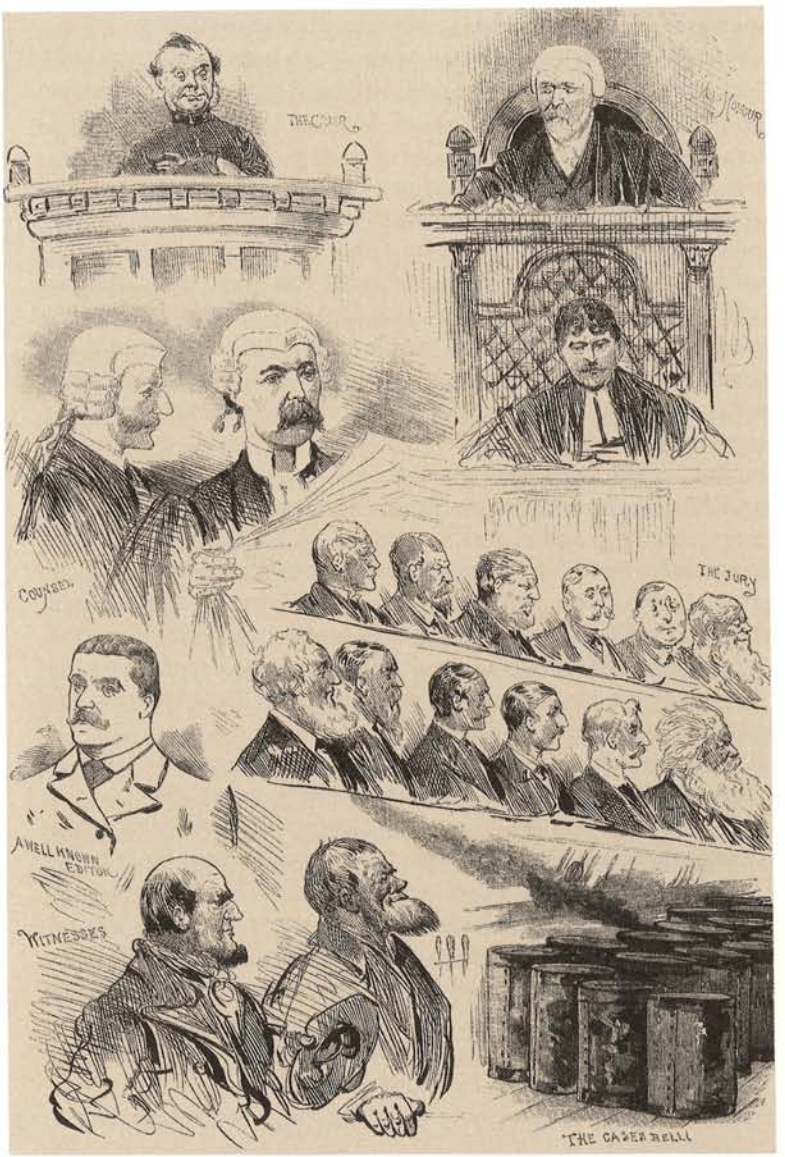


Players in the theatre of the law: the Supreme Court of Victoria. Fewer than two cases in every hundred reached this court and its equivalents in other colonies. Australasian Sketcher, *6 Sept 1887.*

CHAPTER 19

LAW

ON 13 JANUARY 1888 Sarah Francisco appeared in the Port Adelaide police court on a charge of drunkenness. She was an old offender, well known to the police, and she had already over one hundred convictions for drunkenness. The magistrate sentenced her to fourteen days in prison, but two days after her release she was back in court on the same charge, for which she received two months in gaol. In April the magistrate declared her to be 'an habitual drunkard' and sentenced her to twelve months' hard labour. She was beyond help.

Sarah Francisco was not as well known to the public as were those who committed serious crimes, but she was representative of the great majority of people arrested in Australia. There were 166 000 arrests in the six colonies in 1888, and of these 163 000 were dealt with in the lower courts. In these police courts or courts of petty sessions, magistrates sat in judgment alone or two or three together without a jury, and swiftly disposed of the thousands of cases that came before them. The men presiding were unpaid justices of the peace or stipendiary magistrates paid by the government, and they dealt immediately with summary offences such as drunkenness, minor assault, obscene language, petty theft and other minor breaches of the law. In the course of the year they convicted 120 000 cases and dismissed 43 000.

The magistrates sent the more serious cases—indictable offences—to a higher court, presided over by a judge with a jury. Only 3227 cases in 1888 went for trial on indictment at quarter sessions or a supreme court. Three out of four indictable offences were crimes against property such as larceny, burglary, receiving stolen property, arson, forgery and horse, cattle and sheep stealing. One in four were offences against the person, which included the worst crimes of malicious wounding, indecent assault, unnatural offences, rape and murder.

People from the non-respectable section of the working class mainly felt the impact of the police and criminal courts. Few respectable middle-class people would ever come into conflict with the law. But they were kept well informed of its operation, for the newspapers reported in detail the workings of the courts. They

gave most publicity to serious crimes, especially those carrying a possible death sentence. Numerous brief reports from the lower courts gave a squalid and repetitive picture of social problems and casualties of society; the press was not greatly concerned with the continuing plight of people like Sarah Francisco.

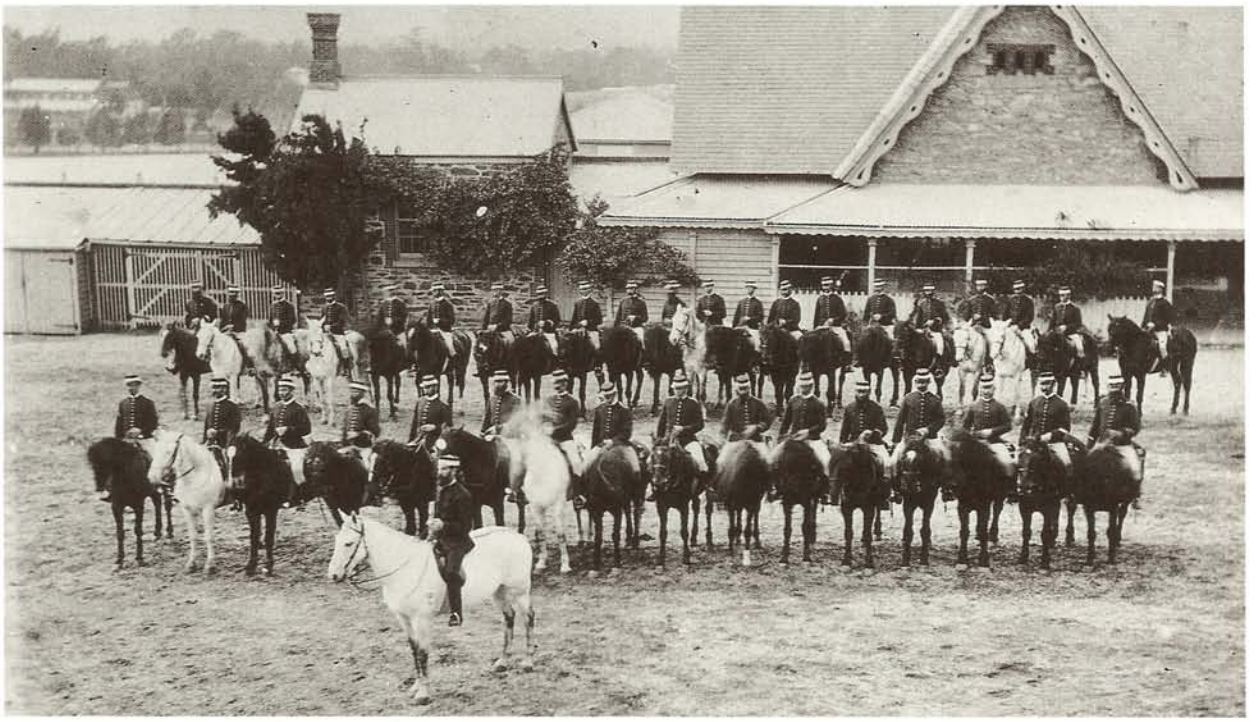
The colonies had all inherited the British system of law, and their legal systems were similar. However, differences emerged between the colonies in their application of the law. In the lower courts, 24 per cent of cases were dismissed in New South Wales but only 11 per cent in South Australia. The proportion of convictions in the superior courts ranged from 8.5 per 10 000 people in New South Wales down to 2.5 in South Australia. Timothy Coghlan rejected as 'manifestly erroneous' the explanation that the high rate of crime in his colony was due to its convict origins. Tasmania, he noted,

> the colony which received proportionately the largest number of convicts and whose population has been least diluted by immigration, has now and for many years had the most favourable record of convictions.

Coghlan argued that criminals came from the floating population of unskilled labourers and that this class was largest in New South Wales. 'As these people settle down to regular employment in a fixed abode', he predicted, 'and acquire interests apart from the excitements of an unsettled life, crime will be found to diminish'.

There were also differences in the problems of enforcing the law in different colonies and locations. Petty crime was more frequent and more visible in the cities than in the countryside. Sydney contained one-third of the population of New South Wales, but accounted for over half the arrests for drunkenness and vagrancy. The pastoral and mining frontiers of Queensland and Western Australia, with their huge distances and scattered population, created special problems for police, especially in relations between settlers and Aborigines. Also in Western Australia,

Of 725 Queensland policemen, one-fifth (156), were stationed in Brisbane and the rest in country districts. Queensland had one policeman per 534 persons, compared to one per 718 in New South Wales.
Queensland Figaro, *4 Aug 1888.*



Mounted police barracks, North Terrace, Adelaide. The South Australian police force comprised 11 senior officers, 176 mounted police and 216 foot police. Sergeants earned 10s 6d a day and constables 7s 6d a day for a six-day week. Mounted police in rural areas received a forage allowance.
STATE LIBRARY OF SOUTH AUSTRALIA

where transportation had ended only in 1868, court records reveal the frequent presence of ex-convicts and ticket-of-leave men under police surveillance, often charged with breaking their conditions of release. In Queensland, respectable people were made nervous by their proximity to Asia and the Pacific Islands. They feared that convicts might escape from the French penal colonies in New Caledonia, and they were anxious about the influx of Kanakas, Malays, Chinese and other coloured races.

POLICE

All the colonies except Tasmania had centralised police forces. They followed the model of the Royal Irish Constabulary, a single force that policed the whole of Ireland. Tasmania, with separate forces for city and country, followed the decentralised English model. The colonial forces recruited heavily from the British forces, especially from the Irish. In 1874, eight out of ten Victorian police were Irish born, many from the Royal Irish Constabulary. Of men who entered the New South Wales police in the mid-1860s, 45 per cent were former Irish policemen or soldiers.

There was some doubt in the centennial year about the efficiency of the colonial police forces. The Victoria Police had handled the Kelly outbreak of 1878–80 badly, and they were investigated by a royal commission in 1881–83. The commission found inefficiency in the rural police and corruption in the metropolitan force in Melbourne, especially in the detective force, and made numerous recommendations designed to improve efficiency. Some were carried out, and although the force was still not considered highly competent, in August 1888 more than five hundred young men applied for fewer than fifty positions.

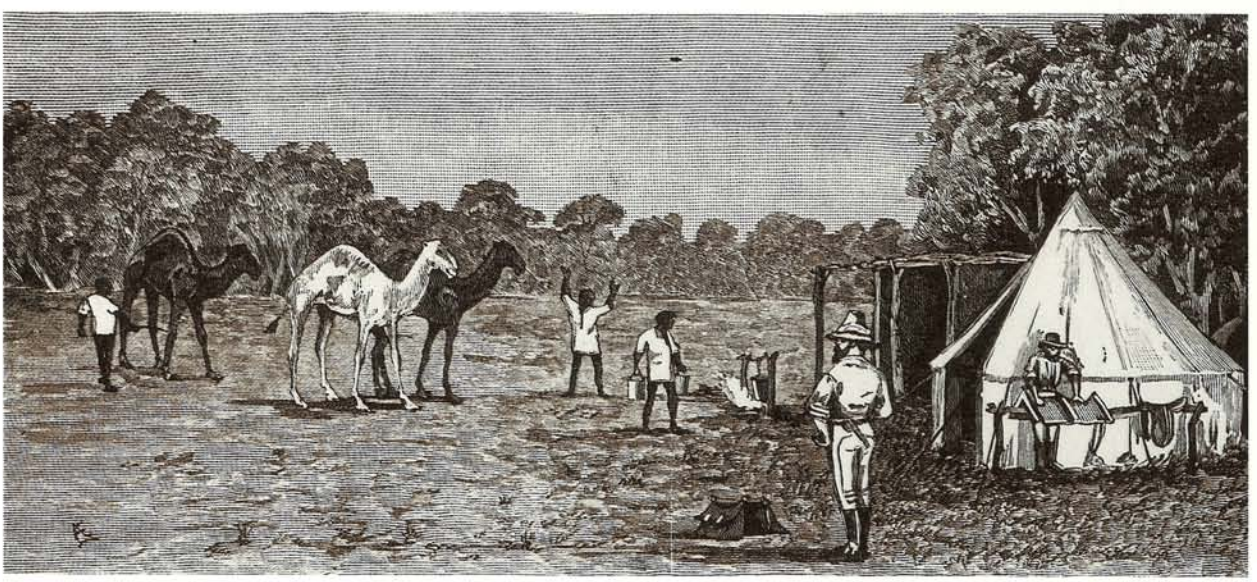
The South Australian police began the year with a widely publicised scandal. Sergeant Leahy, in charge of the Gawler station, had disparaged his subordinates, boasted of his influence over the commissioner of police and asked his daughter

and a friend to write anonymous letters attacking the constables under his command. In response, his constables spread rumours that the sergeant had been intimate with a young girl. The attorney-general and chief secretary investigated the incident and recommended that all the men be dismissed. In October, a civil service commission blamed the force for having too many 'unnecessary inspectors and sub-inspectors', and criticised the officers' disregard for their men.

A constable at Cunnamulla in Queensland was convicted of taking bribes to allow gambling, and evidence suggested that others in the local force were doing the same. More serious was the case of Constable Walker and Kate Brooks in Brisbane. Walker, a plain-clothes policeman, said that he had arrested Brooks in Albert Street, a place notorious for prostitution, for using obscene language. But in court Brooks stated that Walker had returned with her to her room for intercourse; afterwards he had demanded his money back, and when she refused he became violent and arrested her. Brooks's story was supported not only by a brothel keeper but also by Walker's own sergeant. The police magistrate still fined Brooks £2 for obscene language, but the case was subsequently raised in parliament. After a police investigation Walker was transferred to Normanton. 'Recent occurrences have scarcely been of a character to fill the public mind with satisfaction with regard to our Police Department', lamented the Brisbane *Courier*.

Problems plagued the New South Wales force. Complaints in Lismore about the public drunkenness of the local police magistrate and the senior police sergeant led to the sergeant's suspension and a judicial inquiry. The police themselves were generally reluctant to act on complaints. When the magistrate at Deniliquin presented strong evidence that a local senior constable was under the influence of a publican, police refused to give evidence against him. The acting inspector-general and the Deniliquin superintendent agreed that his conduct was wrong, but refused to remove him, for 'if a Constable was removed whenever a Police Magistrate thinks proper to recommend, it will put an end to all discipline in the Force'.

In Sydney a false charge against a plain-clothes sergeant left some uneasiness. Sergeant Taylor was charged with indecent assault on Ada Marshall, aged fourteen. The charge was dismissed, and the evidence suggests that it was trumped up against Taylor by the Marshall family, who were 'known to the police'. Marshall was a



Mounted police at the Diamantina River in the far west of Queensland. They used camels and the tracking and bushcraft skills of Aborigines to chase cattle thieves hoping to overland cattle to Adelaide, Brisbane or the Kimberleys. Illustrated Australian News, *1 Oct 1889.*

gambler, his wife had frequent convictions for drunkenness, Ada's elder sister had been in gaol several times for prostitution, and Ada had been previously summoned for fighting. But even Taylor's evidence showed that he had been on friendly terms with the Marshalls, had accepted two pearl shells as gifts from them and was having a drink with Mrs Marshall at the time the alleged assault took place. The acting inspector-general reprimanded Taylor for 'most reprehensible and degrading' behaviour.

In Western Australia, a dominant concern was how to police the huge area of the colony with a force of about two hundred men. Throughout 1888, the police were under pressure from settlers to give more protection for their sheep and persons against Aboriginal attacks. In November the commissioner of police sent more men up to the Kimberleys, but they remained too few to capture Aborigines in the hostile terrain. Pastoralists often took the law into their own hands in dealing with the Aborigines, and resisted police action against white lawbreakers. North Queensland was another difficult frontier, where in the forests of the Atherton Tableland and on the inland plains Aborigines fought bitter battles against the white intruders. In 1888 police were also used in the Newcastle miners' strike and at the Brookong and other shearers' strikes. For metropolitan police, the frontier was in the inner industrial suburbs of Sydney and Melbourne, where they confronted larrikin gangs. Most police, however, enjoyed the quiet routine, even boredom, of life in respectable suburbs or quiet country towns.

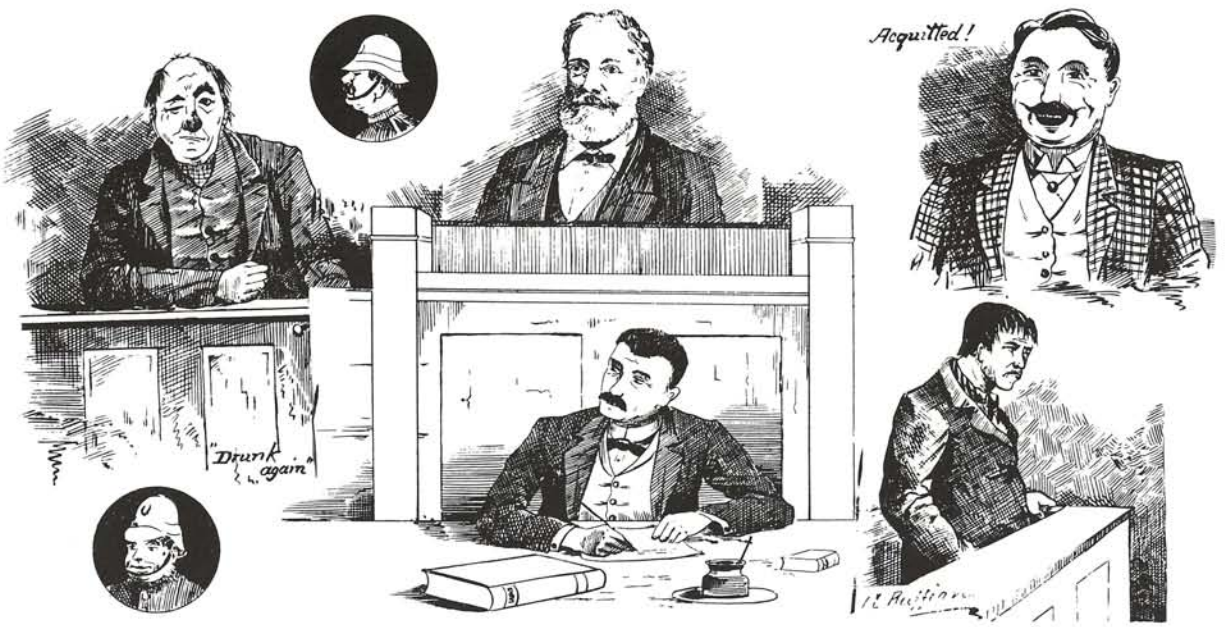
Police had many other duties imposed on them. In the country they acted as stock and slaughterhouse inspectors, customs inspectors and collectors of agricultural statistics. They compiled electoral rolls, attended inquests, fought bushfires and searched for lost stock. At Murrurundi in New South Wales the year passed in a steady stream of routine events for the local police; among the few 'special occurrences' were fires, inquests and a suspicious character noted staying at the local hotel. Only three crimes were reported all year—a man attempting to kill his wife, a small burglary, and malicious damage to a gate—and in September a constable was dismissed for taking money from two boys he had arrested.

'New South Wales Mounted and Foot Police.' Illustrated Sydney News, *15 Sept 1887.*

IN THE MAGISTRATES' COURTS

The office of magistrate or justice of the peace had been inherited from England where, for centuries, the magistrate had been the cornerstone of local government and the administration of justice. The English JPs were usually unpaid lay justices, country gentlemen who assumed the office as part of the responsibilities and privileges of their position. The Australian colonies, lacking a resident country gentry, had to make use of paid officials. So the paid magistrate, known as a police magistrate, was found in far greater numbers than in England. Lay justices continued to be appointed, but the police magistrates took the initiative in most important magisterial proceedings. Australian courts of quarter sessions that tried serious offences differed from their English models; in England they were presided over by a bench of county JPs, in Australia by a judge.

Life in the magistrates' courts was a continuous round of convictions for drunkenness, vagrancy or disorderly behaviour. These were loose legal categories that gave police wide discretion in laying charges. Drunkenness was by far the most common offence. In New South Wales half of all arrests and of all summary convictions were for drunkenness. Half the people in prison were there for drunkenness or vagrancy. When Charles Burton of Brisbane sued his wife for divorce he charged her with adultery; she was at that time in gaol, being a persistent drunkard who had neglected her children and had been convicted eighteen times



The city police court, Adelaide. Proceedings lacked the dignity of the superior courts. 'The space of half an hour is frequently quite sufficient to settle half-a-dozen cases.' Pictorial Australian, *Apr 1888.*

since the start of the year. Burton was granted his divorce. John Hole appeared in Perth police court in July, charged with drunkenness and disorderly conduct. In eighteen months he had collected fifty-seven summary convictions, including nineteen for being drunk and disorderly, five for obscene language, one for destroying the uniform of the arresting constable and the rest for assaults. Sergeant Chaffey said that 'the prisoner was continually loafing about public houses, and but rarely engaged in a day's work'.

The large amount of visible drunkenness horrified many people. The Brisbane *Courier* estimated that alcohol was the cause of 90 per cent of all crimes, and called on the government to establish an inebriate asylum for habitual drunkards who at present had to be sent to gaol. But the high figures of arrests for drunkenness reflected police practice as well as actual drinking habits. Police used charges of vagrancy or drunkenness to arrest prostitutes, 'loafers' or thieves, and they could exercise a wide range of discretion in deciding whether or not to prosecute.

In Adelaide in January, two constables arrested James Jones for being drunk in charge of a horse and dray. In court Jones claimed that the constables had taken him to the police station, assaulted him and locked him up for six hours. The evidence showed that Jones had certainly had a few drinks, but so had the constables. The police could not substantiate their opinion that Jones was drunk and the charge was dropped. Jones, a reasonably respectable and affluent carrier, was then able to use his solicitor to force the commissioner of police to hold an inquiry and grant Jones some satisfaction. Most people arrested for drunkenness could not pursue such remedies. Police used the charge to arrest people they considered undesirable.

To prove vagrancy, police generally had only to show that the accused had no regular work or place to live. In the Perth and Fremantle police courts, vagrancy charges were frequently used by the police as part of their surveillance of ex-convicts and ticket-of-leave men. In Fremantle the police charged Michael Walker, a former convict, with vagrancy. A constable deposed that he had found Walker in a public house and that he had been 'loafing about public houses ever since he came out of prison'. His sergeant added that Walker spent his time

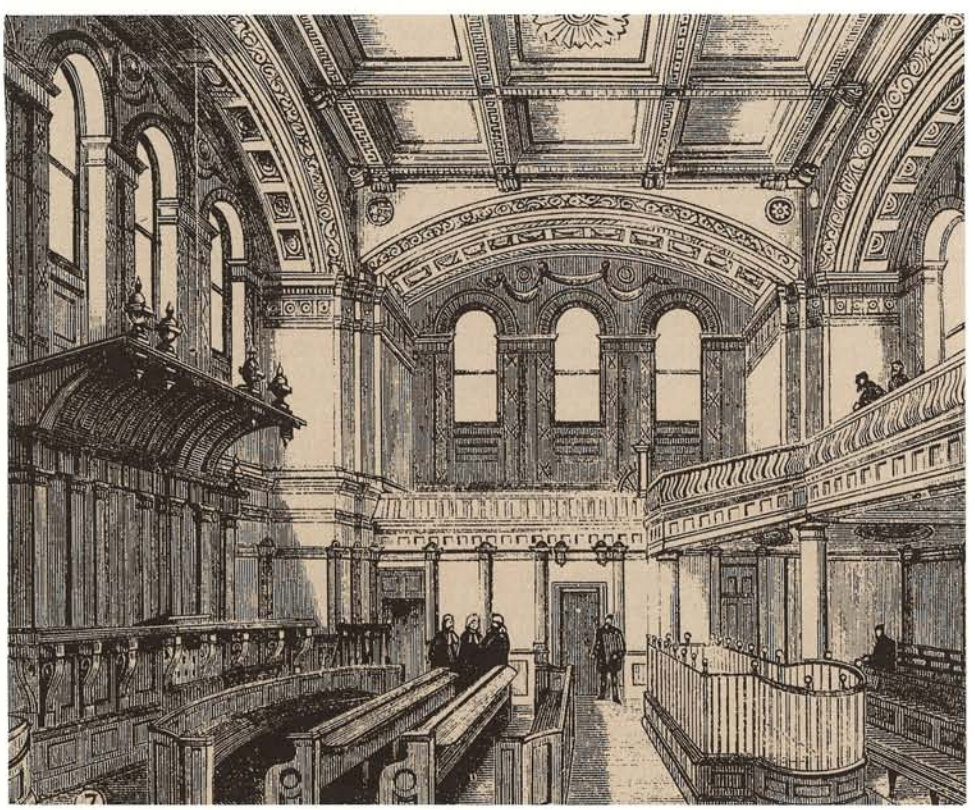
wandering from pub to pub and 'in frequenting Fiddlers' Cottages', a brothel area. Walker was convicted and given three months. Being out of work or sleeping in the open was often used as proof of vagrancy, in the Perth and Fremantle police courts. In Perth, when police charged William Galbraith with vagrancy he replied that he had been 'out of work a week and though he might go into public houses he was no vagrant as he had a home to go to'. The magistrate discharged Galbraith and criticised the police for arresting him. Charles Johnson, found sleeping in the Church of England parsonage ground and given a bad character by the police, got a month in gaol.

In Brisbane the police magistrate, Mr Pinnock, discharged some young prostitutes convicted of vagrancy on condition that they enter the Salvation Army Rescue Home. In March Sarah Mattie, aged 26, with previous convictions for drunkenness and disorderly conduct, was charged with vagrancy and ordered to the same Home. Three weeks later she was back in court. Pinnock tried again to get her into a refuge, but sub-inspector Durham said:

> Your Worship, I got this girl taken in the Salvation Army Home and she made promises but she was back in Albert Street [a brothel street] before 24 hours were up. She has no home, even the Chinamen won't harbour her.

She was given one month, and was soon back in court on similar charges. When Pinnock convicted men, he would frequently discharge them with a travel pass to leave Brisbane immediately.

The police often charged people with using obscene language in a public place. Here, too, the element of police discretion was important. In New South Wales there seems to have been a particular sensitivity to obscene language. Joshua Redman, the local constable of the small northern town of Drake, kept himself



Inside the criminal court of Victoria. Illustrated Australian News, *20 Feb 1884.*

busy arresting people for using it. In March he arrested John Olsen for saying: 'You bloody lump of a white bugger the Lord Jesus Christ you mind the Government are a lot of bloody fuckers. You bloody son of a bitch.' In April Olsen was back in court for saying, when arrested: 'You are a bloody white you bloody bugger fuck you I will kill such a bugger as you.' He was fined £3 or fourteen days in default for each of these offences. When Redman arrested James Pryers for being drunk and disorderly, Pryers kept repeating: 'You bloody thug I could knock a dozen buggers like you into Hell. You lot of fuckers.' He was fined only 10s or seven days.

In Sydney two constables in plain clothes visited Jeremiah O'Connell's hotel on Good Friday, hoping to catch him breaking the licensing laws. They failed to do so, and O'Connell shouted, as he threw them out: 'Why don't you come in uniform? You are not men, you are too mean and contemptible to be called men. I call you sneaks.' The constables charged him for using abusive language. The magistrate dismissed the charge without even calling on the defence. O'Connell admitted using the words, but the magistrate pointed out that the section of the Vagrancy Act under which the charge was brought was intended to prevent breaches of the peace. It was not likely, he thought, that a policeman, sworn to keep the peace, would be provoked by the words into causing a disturbance.

Assault, another common charge in the magistrates' courts, was a very broad legal term that covered everything from a threatening look or gesture to serious wounding. Most assault charges followed police arrests for fighting, but private citizens also brought assault cases against each other. In the courts people continued disputes with neighbours, spouses, employers or employees, workmates and drinking companions. In an Adelaide case Michael McDaniel charged John and Bridget Kirkpatrick with using threatening words towards him; they cross-charged him with the same offence. The trouble was sectarianism, the two families taking up strong Catholic and Protestant positions. 'Very unchristianlike language was indulged in by both', observed the police magistrate as he fined each man 1s.

'Larrikins' was a word much used in the police courts, especially in Melbourne. In a Sydney case, in which the police were rebuked for 'misdirected zeal', Constable William Jackson arrested William Jones, aged sixteen, in Harrington Street for behaving in a riotous manner. Jones, who had previous convictions for larceny and gambling, was known to the police as a member of a group of larrikins who infested the Rocks. But Jones's case was taken up by Marsham McCarthy, honorary manager of the Excelsior Home for Working Lads. McCarthy accused the police of victimising Jones and appeared in court with two other witnesses to give evidence on his behalf. The charges were dismissed. Constable Jackson accused McCarthy of being 'generally meddlesome with the Police whenever they are compelled to lock up boys from the neighbourhood of Harrington Street'.

IN THE SUPERIOR COURTS

People charged with more serious offences would normally go first before a magistrate for a preliminary investigation, except in the cases of murder and manslaughter, where the investigation was usually done at a coroner's inquest. If a magistrate thought that evidence justified it, he would commit the accused for trial before a judge and jury. Such indictable offences might go to one of the intermediate courts, such as quarter sessions, general sessions or a district court. More commonly, they would be tried by the supreme court of the colony, either in the capital city or in one of the towns in which the judges sat on circuit. Queensland had a separate supreme court for the northern half of the colony. Indictable offences were always more serious than summary offences, but the great

majority were offences against property rather than against the person, and most were fairly undramatic.

On 11 May 1888 Thomas Donoghue, John Smith and Henry Towerson were charged at the Collingwood court in inner Melbourne with 'being suspected persons found in a public place with intent to commit a felony'. The young men had been seen acting suspiciously and had stolen property on them when arrested. For their suspicious behaviour—the offence of being judged by the police to be *intending* to commit a felony—the magistrates sentenced the three to twelve months' hard labour. They were then charged with two counts of larceny and Donoghue and Towerson were charged with robbery in company.

At the trial at the central criminal court in Melbourne, Donoghue and Smith pleaded guilty to stealing an overcoat from a restaurant and the crown did not prosecute Towerson on this charge. The three were charged with stealing a handbag and money from a young woman, who was unsure of their identification, and the jury acquitted them. Donoghue pleaded guilty to a charge of robbery in company—assaulting a railway labourer in Flinders street and stealing his watch—and the jury found him and Towerson guilty. The judge, Mr Justice Kerferd, sentenced Donoghue to three years' hard labour and fifteen lashes for the robbery, and gave him nine months hard labour for the larceny. Towerson got four years' hard labour and fifteen lashes for the robbery and Smith was sentenced to nine months for larceny. These sentences were in addition to the twelve months' hard labour all three were serving already as 'rogues and vagabonds'. The *Age* approved of the sentences, and commended Justice Kerferd for 'resorting freely to the lash and solitary cell ... to stamp out the class who make crime their sole industry'.

In the eyes of society and the law, the worst crimes were serious violence to the person, sexual assault and murder. These crimes carried death sentences in all colonies. The trials created great public interest and brought into view ugly aspects of society. Several cases tried in 1888, such as the Wilson and Holly, Griffin and Steele cases, involved Aboriginal victims. These were cases of violence and rape, and they raised questions about the impartiality of the law when a white man and a black man, or a master and a servant, opposed each other in the courts. The Louisa Collins murder trial led people to argue whether a woman should be hanged for murder, the same as a man. In the Hewart case, some people felt that a man might have been wrongly hanged because of reluctance to mention the act of homosexual rape. In all these cases the facts related about human behaviour and the reactions to them indicate the moral assumptions of the wider society.

On 23 March two young labourers, Frederick Wilson and Martin Holly were returning home from the races at Condah in the Western District of Victoria. They were both drunk and carrying bottles of whisky, and they encountered Jenny Green, her husband Tommy and their young son, and another Aborigine, Billy Gorry, all walking home. They forced Jenny Green to drink some whisky, knocked down the two men and raped her. A nearby farmer, Joseph Rawlinson, intervened, but retreated when Wilson hit him on the head with a bottle and threatened him with a revolver. Rawlinson called the police, and Wilson and Holly were arrested. They stood trial for rape at Hamilton in July, and the jury found them guilty after only twenty minutes' deliberation. As rape was a capital offence, the judge recorded death sentences, but recommended that they be commuted. Each man was given eighteen years' hard labour, with two floggings of fifteen lashes each.

At the trial the defence counsel submitted that blacks were unreliable witnesses and that most were drunkards. There were hints that the rape of a black woman was not as serious as the rape of a white woman. Even the judge noted with relief

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in his report to the government that the Crown case did not rely solely on the Aborigines' evidence, but could also call on Rawlinson, 'a thoroughly reliable witness, an elderly and apparently respectable farmer'. However, the fact remains that a rural white jury did convict the men, and they were punished severely. The *Hamilton Spectator* called the crime

> one of the most repulsive that has come under our notice; indeed it is doubtful whether in the criminal annals of the colony anything more filthy and degrading has been placed on record.

The paper also noted that in the notorious Mount Rennie rape case in Sydney in 1886, four men had been hanged, while in this case the judge had commuted the death sentence; was the difference because the Mount Rennie victim was white?

In Western Australia later in the year a white man named Michael Griffin was tried for the murder of an Aborigine. He had gone with three Aborigines to the Fraser Range, inland from Esperance Bay. He was looking for an Aborigine called Marabool, whom he accused of stealing some rations. According to the evidence of the three Aborigines he found Marabool at Flat Rock, and ordered the three to chain him to a cartwheel, hit and kicked him and left him chained up all night. Next morning Griffin beat him until he became unconscious, and then revived him by having red-hot ashes from the fire thrown on to him. He beat him again and mutilated his genitals with a forked stick. The Aborigines never again saw Marabool alive.

Griffin threatened to shoot the Aborigines if they told the police, and not until four months later did news of the killing reach police. A small detachment of police from Albany, under Inspector Rowe, were visiting Esperance in early October, and they took a statement from one of the Aborigines who had witnessed the murder. The inspector's report suggests that if it had been left to the local Esperance policeman, no attempt would have been made to arrest Griffin.

The next stage of the story illustrates the problems of policing the outlying parts of Western Australia. An expedition of three policemen and one Aboriginal witness went out to the Fraser Range (a journey of two days) and found the remains of a body which they identified, with difficulty, as that of a black man with his genitals missing. They buried the body and took the head back to Albany for medical examination. They also looked for Griffin, but with no success. He had taken off into the interior, heavily armed and threatening to kill the informers, and he was said to be planning to escape across the desert to South Australia. It was not until 16 November that a party of police and black trackers which had set out on 17 October caught up with Griffin and arrested him.

Griffin was tried in the supreme court in Perth in December. The Aboriginal witnesses' evidence, with the police and medical evidence, constituted the case for the crown. Griffin called no witnesses for his defence, and made no statement himself. His defence counsel simply stressed that 'the only witnesses were natives'. They should not, he thought, depend upon such evidence, unless materially corroborated. He questioned whether the body had even been proved to be that of Marabool, and argued that there was no clear motive for Griffin to kill Marabool: the whole story was concocted by the Aborigines to protect themselves, and they were probably the murderers. The chief justice cautioned the jury against being swayed by the defence counsel's stress on discrepancies in the witnesses' stories, but he himself kept returning to them. He emphasised the problems of relying solely on black witnesses, and he agreed with the defence counsel

> that the story was of so brutal a nature that one hated to believe it, and if they could find any way not to believe it, he knew they would not. It might be that

it was an outcome of the barbarous habits of the blacks, but that a white man could be guilty of such brutality it was hard to believe.

After only eighteen minutes, the jury acquitted Griffin.

The *West Australian* expressed 'horror and disgust' at the facts of the Griffin case, 'an atrocity exceeding even those blood-curdling Whitechapel murders we have had served up for our edification of late'. (Reports of the 'Jack the Ripper' killings in London were filling the Australian press from October onwards.) The *West Australian* was concerned that the Griffin trial would bring into question the state of race relations in the west. It was certainly true that in areas sparsely patrolled by police, some white men were taking the law into their own hands.

An earlier trial had demonstrated this when George Steele, the owner of a station near Geraldton, was charged with assaulting an Aboriginal employee named Monkey. He had handcuffed him, knocked him down and then chained him up for four days. While Monkey was chained up, Steele flogged him with a stockwhip, cutting his back badly. The case, brought to the Geraldton police court by the local protector of Aborigines under the Aborigines' Protection Act, was the first such prosecution at Geraldton. The defence counsel stated that the charge would not be contested and asked that it be heard summarily by three JPs rather than committed for trial. The justices agreed; this restricted the maximum penalty which could be imposed to two months hard labour or a fine of £5. Steele's defence was that he had punished Monkey for burning an Aboriginal woman. The magistrates found Steele guilty of assault and fined him only £5.

> They could not help feeling that the accused had gone a little too far and that he had perhaps meted out more severe punishment to the native Monkey than he deserved. It had to be remembered that the Government did not guarantee police protection on the far outlying stations and it was necessary (and the Government recognised it as a necessity) that in such circumstances, that the settlers should, within reasonable limits, take the law into their own hands with a view to the preservation of law and order.

Supreme Court, Perth. Western Australia, the only Australian colony not yet self-governing, made do with a building constructed in 1835 for use as the commissariat store.

LAW SOCIETY OF WESTERN AUSTRALIA

The same court had just heard another case involving Steele. He had prosecuted a number of shearers under the Master and Servant Act for 'leaving off work before the shearing was completed'. The shearers were found guilty, their spokesman fined £25 and costs (£50 in all) and the rest £5 each. The shearers' counter-claim for wages due had been dismissed. The local newspaper attacked the decision as 'but a short remove from the merest parody on justice'. Steele replied:

> As for the flogging (and that is the only thing that hurt him) he got about a dozen cuts with a stock whip and I consider he deserved every one of them and so does everyone that knows what natives really are ... I do not think that any other country in the world, W.A. excepted, would tolerate for one moment the laws in favour of aborigines that we in the bush are compelled to suffer under ... And now in conclusion may I ask what do you know about natives, their habits, customs, etc.? It is men like you and the editor of the *Morning Herald* that cause half the trouble between whites and blacks by writing of things which you know absolutely nothing about.

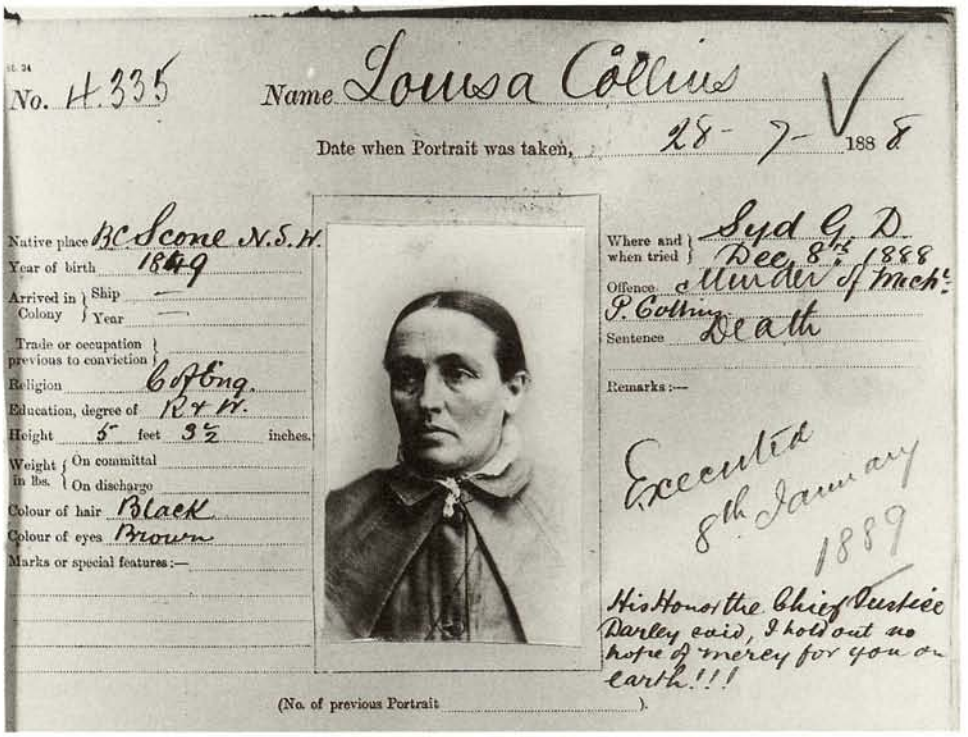
Race relations in Queensland were in a similar state. When a Malay called Sedin ran amok in Normanton, north Queensland, and killed three white men in July, white mobs rampaged through the town. The government removed 84 Malays, Spanish, French and black Americans to the safety of Thursday Island. Sedin was executed for his crime in November, but at the end of the year the evacuated Malays were still stuck on Thursday Island, unable to return and given no compensation.

In another famous murder, that of Bridget Barker, aged nine, at Bunya near Brisbane, it was at first reported and widely believed that she had been killed by a 'blackfellow'. Only after the police and black trackers had investigated did the story change. After a long preliminary investigation in the Brisbane police court the girl's mother was committed for trial for the murder.

It was in Sydney that the two most spectacular murder cases occurred. On 2 March the *Sydney Morning Herald* called on the government to restrict the sale of Rough on Rats, a popular 'proprietary medicine containing arsenic'. Taking this rat poison had proved to be a popular way of committing suicide. Eighteen of the nineteen women who killed themselves in New South Wales in 1888 used Rough on Rats, but the poison was to win its greatest publicity and notoriety not because of suicide, but through the trials for murder of Louisa Collins, the 'Botany Poisoner', whose story held the public interest throughout Australia for the second half of 1888.

In July an inquest was held into the death of Michael Peter Collins, a woolwasher, aged 29 years. Two doctors were suspicious of the circumstances of Collins's death, one having attended Mrs Collins's previous husband, Charles Andrews, when he died early in 1887. The inquest established that Collins had died of arsenical poisoning, and Louisa Collins, aged 39, was committed for trial for murder. Andrews's body was then exhumed and found to contain faint traces of arsenic. Collins had lodged with Charles and Louisa Andrews and had married Louisa within a fortnight of Andrews's death. (No one remarked how appropriate it was—in this story of a woman whose first husband died of poison, and who married a second with indecent haste—that the name of the government analyst who detected the poison was Hamlet.) Louisa Collins was now committed for trial for the murder of her first husband as well.

In the end, Louisa Collins was to stand trial three times for the murder of Collins and once for the murder of Andrews. At the trial for Andrews and the first two trials for Collins, the juries were unable to reach a verdict. Only at her fourth trial,



No. 4335 Name Louisa Collins

Date when Portrait was taken, 28-7-1888

Native place BC Scone N.S.W.
Year of birth 1849
Arrived in Colony { Ship — Year —
Trade or occupation previous to conviction
Religion C of Eng.
Education, degree of R & W.
Height 5 feet 3½ inches.
Weight in lbs. { On committal On discharge
Colour of hair Black
Colour of eyes Brown
Marks or special features:—

Where and when tried { Syd G D Dec 8th 1888
Offence Murder of Mch: P. Collins
Sentence Death
Remarks:—

Executed 8th January 1889

His Honor the Chief Justice Darley said, I hold out no hope of mercy for you on earth!!!

(No. of previous Portrait).

Prison record of Louisa Collins.
ARCHIVES OF NEW SOUTH WALES

before the chief justice in December, was she found guilty of murdering Collins. The medical evidence showed that Collins had died of arsenical poisoning, administered in small doses over a long period. There was an open box of Rough on Rats in the house. The glass found by Collins's bed, containing a white liquid that Louisa said was milk, proved to contain arsenic. The defence was that arsenic had entered Collins's system via his trade as a woolwasher, or that he had committed suicide, being depressed because he was out of work. Presumably doubts about whether the prosecution had firmly linked Louisa to the actual administration of the poison had prevented the first two juries from agreeing. Once she had been convicted, an appeal before the chief justice and two other judges was turned down, and the government then rejected numerous petitions and pleas for mercy for her. Louisa Collins was to be hanged at Darlinghurst on 8 January 1889.

Michael and Louisa Collins. Town and Country Journal, *11 Aug 1888.*

Public controversy over the execution centred on two main points. The first was that there had been two mistrials for Collins and one for Andrews before she was convicted of Collins's murder. Some people thought that the English jury system, which required all twelve jurors to be unanimous to reach a verdict, seemed to make the outcome of capital trials uncertain, subjecting the accused to a grotesque lottery. The barrister and politician David Buchanan favoured the Scottish system, in which juries were only required to reach a majority verdict. Collins was eventually hanged on the decision of twelve jurymen, after thirty-six others had failed to agree. The *Bulletin* commented

> Thus, though there be legal certainty to justify a sentence of guilty, there must be the highest moral certainty present before the sentence can be executed. Seeing that three juries have disagreed on her case and only the fourth has found her guilty this highest degree of moral certainty is at once wanting.

What upset most people was that the government proposed to hang a woman. The newspapers were flooded with letters arguing for and against a reprieve.

Members of parliament even used the financial estimates for the department of justice to force a heated debate. The *Sydney Morning Herald* regarded this as outrageously improper; like most of the press it favoured hanging Collins.

One of the strongest pleas for a reprieve, used especially in petitions addressed to the governor, argued that it was 28 years since a woman had been hanged in New South Wales, and that it would be

> abhorrent to every feeling of humanity and a shock to the sentiments of cultured individuals in this nineteenth century, both here and in other English-speaking communities, that a woman should suffer Death at the hands of a hangman.

The two largest petitions—one with 700 signatures from Sydney and the other signed by 220 women in Victoria—stated that all capital punishment was barbarous and out of date. Another group approved of capital punishment, but not for women.

Some people, however, used this doctrine to argue for the opposite conclusion. Precisely *because* wives were supposed to be the protected, weaker and softer sex, whose lives should be spent providing comfort for their husbands, Louisa Collins's crime was abominable and worse than any man's violence. This view was widely held. Coghlan wrote that 'female offenders are, as a rule, found to be more depraved than male'. The chaplain at Pentridge prison in Melbourne considered that 'a really bad woman is worse than a really bad man'. Collins had cold-bloodedly poisoned her husband, to whom she should have been a 'ministering angel'. She had become 'a devil disguised as an angel', she was 'a disgrace to the very name of women', and

Sir Frederick Darley, chief justice of New South Wales from 1886. He and two brother judges rejected Louisa Collins's appeal.
MITCHELL LIBRARY

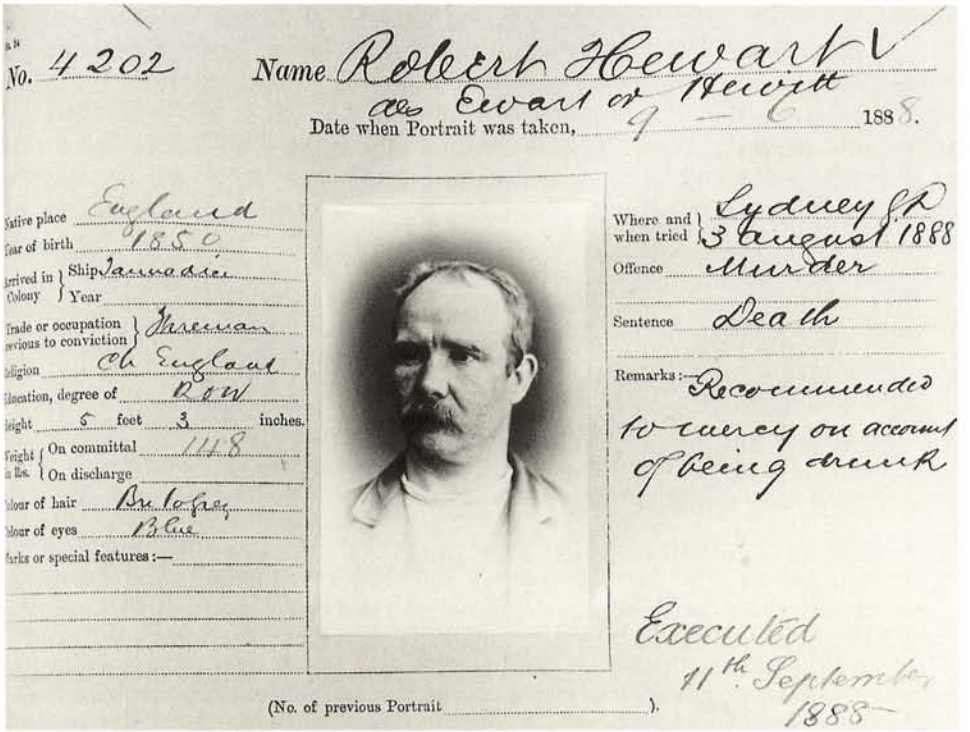
> if through the idiotic, absurd folly of humanitarians (so-called), she escapes the right award of the law, not only Sydney but all Australian society will be rendered unsafe from the like heartless dealings of unscrupulous, wicked women.

The premier Sir Henry Parkes, defending his government's action in parliament, said that he was personally opposed to capital punishment but that it should be carried out in this case.

> They knew that when woman yielded to crime she was not stayed by any consideration. (*Hear, hear.*) The worst of crimes had been committed by women. In the fearful period when France ran riot in blood, those who were the most guilty of the most ferocious delight in blood were women—young women—tender girls. (*Hear, hear.*) Creatures who hoisted the heads of their fellow-creatures on pikes were women, and at all times and under all circumstances when woman once forgets the character of her sex there was no barrier to the lengths she would go in crime. (*Hear, hear.*)

The capital cases described so far show how considerations of race and gender intruded into the legal process. An aspect of human behaviour that people did not mention—sexual relations between men—might have helped to determine the fate of Robert Hewart, tried and sentenced to hang in 1888. Hewart, a ship's fireman aged 38, was an habitual drunkard with a record of many convictions but no violence. He spent 25 May drinking in a Sydney hotel, became fairly drunk and put his fist through a glass screen in the bar. He was arrested and locked up, at about 6.30 pm, in a cell at the central police station. The cell was already occupied by Thomas Park, who had been locked up an hour earlier, hopelessly drunk.

At 7.20 pm the police went to the cell to put in another prisoner and found Park



No. 4202 Name Robert Hewart
alias Ewart or Hewitt
Date when Portrait was taken, 9 – 6 1888.

Native place England
Year of birth 1850
Arrived in Colony { Ship Jamaica Year
Trade or occupation previous to conviction Fireman
Religion Ch England
Education, degree of Dow
Height 5 feet 3 inches.
Weight in lbs. { On committal 148 On discharge
Colour of hair Brown
Colour of eyes Blue
Marks or special features:—

Where and when tried Sydney SC 3 August 1888
Offence Murder
Sentence Death
Remarks:—Recommended to mercy on account of being drunk

Executed 11th September 1888

(No. of previous Portrait).

Prison record of Robert Hewart.
ARCHIVES OF NEW SOUTH WALES

lying on the floor with his trousers down and his genitals severely mutilated. A few days later Park died in hospital, having first made a statement that Hewart had mutilated him. The morning after the crime, the police found Hewart had a penknife; they never explained satisfactorily how he came to have it in the cell, as he had been searched when brought to the station. Hewart claimed that the knife had been taken from him in the search and had then been planted in the cell after Park was discovered.

Since medical evidence at the trial stated that the mutilations had been caused not by a sharp instrument but by hands and fingernails, the knife was really irrelevant, even though much importance was attached to it in evidence. Hewart was charged with murder and the trial lasted less than a day. Hewart claimed that he was very drunk and asleep at the time and suggested that Park must have mutilated himself. The jury found him guilty, but made a recommendation to mercy. The judge sentenced him to death.

Hewart's case and death sentence attracted great public interest in Sydney. The *Sydney Morning Herald* devoted several editorials to the case. Two petitions for mercy were presented; one was from nine of the twelve jurymen, the other was signed by 330 people. The jurors argued that 'the culpable negligence of the police' had contributed to the crime; the *Herald* and many letter writers agreed. Many people argued that Hewart was at the time insane or very drunk and therefore not responsible for his actions. As Hewart staunchly maintained his innocence to the end, some believed that Park might have mutilated himself.

The evidence left disturbing loose ends, some of which Hewart himself took up in appeals. Why did the police hear no cries from the cell? How did Hewart's penknife escape the careful search by the police when he was locked up? There is some evidence that police statements made after the trial were written to counter pleas for mercy. These statements were at pains to say that Hewart was not drunk when arrested, though the evidence of the policeman who charged him and of a

man in the station when Hewart was brought in was that he was very drunk. Hewart claimed that blood on his hands was his own, caused when he punched his fist through the glass screen; the arresting constable stated later that Hewart's hands had not been cut, which seems unlikely. Hewart said he had been asleep when the police discovered Park, but police claimed he was awake. One officer stated that he found Hewart 'standing and looking attentively' when he entered the cell; the words 'standing and' were later crossed out in pencil, so as to agree with those of the other three policemen involved, who all stated that they found Hewart sitting on the bed.

The government refused to grant clemency to Hewart and he was executed on 11 September. Only two people were executed in the centennial year in New South Wales, and a number of sentences were commuted. Why did the judge and the government insist on this one being carried out? The main reason seems to have been a publicly unspoken one; that Hewart had caused the mutilations in the course of an attempted homosexual rape, and deserved death for this reason. This is stated explicitly in the judge's report to the governor, which was never published.

> Nothing appeared in the case to indicate the motive which could have induced the commission of so barbarous an act, but the Crown Prosecutor afterwards informed me that the Police suspect that it commenced in an attempt to commit Sodomy, and they are led to this by having observed acts of indecency on the part of Hewart on former occasions when he has been confined in the lockup.

The judge was clearly influenced by learning this only after the trial was over, when the defence would have no opportunity to reply. Suspicion that Hewart had been guilty of 'the abominable crime of buggery' was present as an unspoken undercurrent that inhibited those appealing for mercy for him. The main petition made an uneasy reference to Hewart's possible insanity 'as evidenced by his alleged unnatural propensity'. Nicholas Hawken MLA wrote to Sir Henry Parkes arguing that normally such a case would have many more people asking for mercy on humanitarian grounds,

> but because of the unmentionable character of the outrage the dainty and the chaste are silent and purity will not irritate its sensitiveness, but to you as a student of psychology nothing should be 'common or unclean'.

But such appeals had no effect, and Hewart, 'being entirely destitute of friends in these Colonies ... and a Native of the North of England' was duly hanged at Darlinghurst prison.

IN THE PRISONS

Public reaction to the Louisa Collins case and to capital cases in other colonies showed that there was considerable feeling in favour of abolishing, or at least restricting, the exercise of capital punishment. There were seventeen capital convictions in New South Wales in the year, with only two hangings. In the decade to 1888 there had been 143 convictions with 24 executions. Most death sentences were commuted to sentences of penal servitude, for life or for very long periods, to be served in prisons such as Pentridge in Victoria, Darlinghurst in New South Wales, St Helena in Queensland or Yatala labour prison in South Australia. In Western Australia, Aborigines imprisoned for serious offences were likely to find themselves in Rottnest prison, while white prisoners went to Fremantle gaol. Tasmania had gaols at Hobart and Launceston. Long-term prisoners were put to hard labour and given additional punishments such as solitary confinement. Lesser

PRISONERS AT EXERCISE, GOULBURN GAOL.

Prisoners exercise at Goulburn gaol, New South Wales. The five principal gaols were at Sydney, Berrima, Parramatta, Bathurst and Goulburn. There were also 47 smaller gaols, most of them police lockups. The prison population of New South Wales on 31 December 1888 was 2353, double that of Victoria, which had a similar total population of just over a million. Illustrated Sydney News, *28 June 1888.*

sentences were served, with or without hard labour, in many prisons around the colonies. There was always a high turnover in the prison population, since it included people waiting trial and people imprisoned for non-payment of court orders and fines. The smaller gaols had a rapid turnover in people serving short sentences.

The Victorian statistician Henry Hayter noted that the level of education of Victorian prisoners had improved steadily since 1873; in 1888, 87 per cent could read and write. He noted also that Irish born and Roman Catholics made up a disproportionately large share of the prison population, while the smallest groups, compared with the general proportions in the population, were born in Australia and China. He did not offer any reasons for these figures.

In 1888 the Australian colonies had just begun to operate a system of probation for offenders, with Queensland leading the way. Under that colony's Offenders Probation Act, first offenders sentenced to imprisonment for three years or less could have their sentences suspended by the governor. The probationers were placed under police supervision and would have to serve the original sentence only if they broke the terms of probation. Queensland granted probation to 119 people in 1887, and to 188 in 1888. Probationers included Benjamin Kitt, the offender in the case that precipitated a constitutional crisis in September 1888. Victoria followed Queensland's example with a similar provision for offenders under the age of twenty-one and sentenced to three years or less. In 1888, sixteen prisoners were released on probation.

The agitation over Collins's execution reminded the people of New South Wales at the end of the centennial year that this was still a society that could legally take human life. 'If New South Wales starts on the second era of her existence by abolishing the death penalty, she will have set a noble example to the rest of the world', urged one writer of a letter to the paper. But New South Wales ended the year, as did all the other colonies, with the death penalty still in force. Though there were only six executions in Australia in the year, the colonial governments were not prepared to forswear this awful power of the state.