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ORIGINAL ARTICLE

Protecting the Colony from its People: Bushranging, Vagrancy, and Social Control in Colonial New South Wales

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The 1830s saw a flourishing of legislation across the British Empire that was designed to control colonial populations.[1] From the vagrancy statutes passed in the wake of apprenticeship ending in the Caribbean to the Dacoity Act legislated in India, statue law was used to police the movement of colonial populations and granted the authorities exceptional powers to combat crime.[2] The New South Wales Bushranging Act of 1830 and the Vagrancy Act of 1835 were passed during the same period with similar aims to those of the Caribbean and Indian statutes, but there were two significant differences. New South Wales was a settler colony. And its statutes targeted British subjects who were white. The New South Wales Bushranging Act and Vagrancy Act were passed against the backdrop of the British "Age of Reforms," as British law was mobilized to achieve social, political, and economic change across Britain and its empire.[3] These legislative powers aligned with the wider "Rage for Order"—

[1] Lisa Ford, *The King's Peace: Law and Order in the British Empire* (Cambridge, MA: Harvard University Press, 2021).

[2] Radhika Singha, "'Providential' Circumstances: the Thugee Campaign of the 1830s and Legal Innovation," *Modern Asian Studies* 27 (1993): 83–146; Anthony De V. Phillips, "Emancipation Betrayed: Social Control Legislation in the British Caribbean," *Chicago-Kent Law Review* 70 (1995): 1369–71; William A. Green, "James Stephen and British West India Policy, 1834-1847," *Caribbean Studies* 13 (1974): 37–39, 41, 46; O. Nigel Bolland, "Systems of Domination After Slavery: the Control of Land and Labour in the British West Indies after 1838," *Comparative Studies in Society and History* 23 (1981): 594, 617; and Ayshah Johnston, "Vagrancy and Poverty in the Post-Emancipation Anglophone Caribbean, 1834–1900" (PhD diss., University of Edinburgh, in progress).

[3] Arthur Burns and Joanna Innes, eds., *Rethinking the Age of Reform: Britain 1780-1850* (Cambridge: Cambridge University Press, 2003); Roger French and Andrew Wear, eds., *British Medicine in an Age of Reform* (London: Routledge, 1991); Michael Turner, *British Politics in an Age of Reform* (Manchester:

the British impulse to impose particular legal regimes across their dependencies—that legal historians Lauren Benton and Lisa Ford describe as characterizing the first half on the nineteenth century.[4] These statutes were similarly part of an imperial moment that saw legal protections afforded by the rule of law eroded in order to secure the King's Peace across the British Empire.[5] The New South Wales legislation was connected to these broader trends, but it would be a mistake to view these colonial criminal statutes solely through a reformist, international, or imperial lens.

During the 1830s, the Bushranging Act and the Vagrancy Act were crafted to prevent crime, revolt and insurrection in the colony of New South Wales. These statutes contained exceptional methods to police and control colonial populations and suspended legal safeguards designed to protect the population from abuses of power. Supporters of the laws argued that extreme measures were necessary due to the emergency of the occasion. Understanding the Bushranging and the Vagrancy Acts' enactment and operation, as well as the purposes they were designed to serve and the liberties they infringed to achieve these ends requires attention to local circumstance. A fine-grained analysis, rooted in the peculiarities of life in colonial New South Wales and anchored by the law's operation on the ground is needed to understand the malleability of British law at this place and at this time. In this article, I argue that rather than a select criminal contingent, the New South Wales' authorities increasingly feared that the composition of the colony threatened their colonial enterprise. The Bushranging Act of 1830 and the Vagrancy Act of 1835 contained wide coercive and discretionary powers to mitigate the extent of this threat.[6]

There are three contexts necessary to understand the anxieties that plagued respectable settlers and government authorities in 1830s New South Wales: penal, free settler and settler colonial. New South Wales was established as a penal colony in 1788, although it was never solely a site for bonded criminals. Convicts could work off their sentence, receive a ticket of leave or a pardon from the Governor, but these were only the official channels through which they could regain their liberty. Many convicts were not content to wait. Some absconded. Some became bandits, known locally as "bushrangers," and robbed in order to survive. The years from 1825 to 1835 represented the peak period of bushranging in the early colony.[7] Such was the fear convict bushrangers provoked, that the authorities believed a full-scale revolt was a

Manchester University Press, 1999); and Matthew Andrews, *Universities in the Age of Reform, 1800–1870* (London: Palgrave Macmillan, 2018).

[4] Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law* (Cambridge, MA: Harvard University Press, 2016).

[5] Ford, *The King's Peace.*

[6] Bushranging Act 1830 (NSW), 11 Geo. IV No. 10; Vagrancy Act 1835 (NSW), 6 Will. IV No. 6.

[7] Paula Byrne, *Criminal Law and Colonial Subject: New South Wales, 1810–1830* (Cambridge: Cambridge University Press, 2003), 129–151; Meg Foster, "The 'Other' Bushrangers: Aboriginal, African American, Chinese and Female Bandits in Australian History and Social Memory, 1788–2019" (PhD diss., University of New South Wales, 2020), 5–11; Jennifer McKinnon, "Convict Bushrangers of New South Wales, 1824–1834" (Master's diss., La Trobe University, 1979); and Hamish

real and dangerous possibility. The Bushranging Act was passed to respond to this threat.[8]

Difficulties controlling the penal population were not the only ones to endanger the colony or require a statutory response. By the 1830s, colonial demographics were changing. Not only were free settlers moving to the colony in unprecedented numbers, but there were also growing numbers of emancipists—ex-convicts who were free from their sentences—swelling the populations' ranks.[9] There were signs that transportation might not be a part of the colony's future, and that New South Wales might transition from a penal colony to one of free settlers.[10] This raised new concerns for government. However imperfect, there were extensive legal safeguards in place for convicts: mechanisms that allowed surveillance, policing and intervention. Emancipists or free settlers of the lower classes were not controlled by the same powers, even though the authorities believed them to have a propensity for crime due to their class, criminal origin or association. The Vagrancy Act of 1835 picked up where the Bushranging Act left off, to impede the threat of nefarious free colonists. Much has been written about colonial vagrancy law and there has been some (small) attention to this bushranging statute, but no scholar has recognized the entangled history of these pieces of legislation in colonial New South Wales.[11] Although the Bushranging Act was introduced in 1830 whereas the Vagrancy Act was passed 5 years later, these statutes worked together to control dangerous elements of colonial society.[12] With their passing, lawmakers tacitly agreed that impinging free subjects' liberty was a small price to pay to secure the government's foothold in the colony.

However, the Bushranging Act and the Vagrancy Act were not the products of colonial demography alone. They were also the products of settler colonialism. Settler colonies are distinct from other colonial projects in that "settlers

Maxwell-Stewart, "The Bushrangers and the Convict System of Van Diemen's Land, 1803–1846" (PhD diss., University of Edinburgh, 1990).

[8] Bushranging Act 1830 (NSW), 11 Geo. IV No. 10.

[9] See the section "From Convict Concerns to Free Colonist," later in this article.

[10] Ibid.

[11] For vagrancy, see Catherine Coleborne, "Mobility Stopped in its Tracks: institutional narratives in the Australian and New Zealand World, 1870s-1900s," *Transfers* 5 (2015): 87–103; Julie Kimber, "Poor Laws: an Historiography of Vagrancy in Australia," *History Compass* 11 (2013): 537–50; Leigh Straw, "'The Worst Female Character': Criminal Underclass Women in Perth and Freemantle, 1900–1939," *Journal of Australian Studies* 37 (2013): 208–24; Julie Kimber, "'A Nuisance to the Community': Policing the Vagrant Woman," *Journal of Australian Studies* 34 (2010): 275–93; Susanne Davies, "'Rugged, Dirty…Infamous and Obscene': the 'vagrant' in Late Nineteenth Century Melbourne," in *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia*, ed. David Philips and Suzanne Davies (Melbourne: Melbourne University Press, 1994), 141–65; A. L. Beier and Paul Ocobock eds., *Cast Out: Vagrancy and Homelessness in Historical Perspective* (Athens: Ohio University Press, 2008); Susanne Davies, "Vagrancy and the Victorians: the Social Construction of the Vagrant in Melbourne, 1880–1907" (PhD diss., University of Melbourne, 1990). For the Bushranging Act, see Michael Eburn, "Outlawry in Colonial Australia: The Felons Apprehension Acts 1865–1899," *ANZHL E-Journal* (2005): 86–87; Andrew McLeod, "The Origins of Consorting Laws," *Melbourne University Law Journal* 37 (2013): 116; and Ford, *The King's Peace,* 176–217.

[12] Bushranging Act 1830 (NSW), 11 Geo. IV No. 10; and Vagrancy Act 1835 (NSW), 6 Will. IV No. 6.

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come to stay." Settlers aim to create new, permanent societies in the lands that they colonize, and this necessitates the dispossession and "elimination of the native."[13] Despite more than 40 years of colonization, the ravages of smallpox and frontier warfare, Aboriginal people were still fighting to keep their Country in 1830s New South Wales.[14] Indeed, the late 1820s and 1830s saw levels of violence between colonists and Aboriginal people reach new and ferocious heights.[15] Although the Bushranging Act makes no mention of Aboriginal people and the Vagrancy Act makes only passing reference to this group, both pieces of legislation were embedded in the frontier context and were responses to the need to safeguard a British colony from the damaging fallout of settler colonization.[16]

The intersection of penal, free settler and settler colonial concerns is evident in the structure of this article. The piece opens by focusing on the 1830 Bushranging Act and the controversies surrounding its entry into law and 1834 re-enactment, as well as the disjuncture between rhetoric surrounding the law and the legislation's implementation in the colony. The article then shifts to provide a close reading of one episode of frontier conflict in Berrico (the Hunter region of New South Wales) to reveal the dangers posed by free colonists, bushranging and frontier warfare during this period. This particular instance of frontier conflict precipitated discussion about the need for a colonial vagrancy statute, and so the section that follows charts the development of vagrancy legislation in New South Wales. This article examines how British law was used, adapted, and at times disregarded to shore up British rule in colonial New South Wales. The Bushranging and the Vagrancy Acts were forms of social control that together sought to safeguard the colony from its own population, as well as manage the transition of New South Wales from a penal colony to a colony of free settlers. They were weapons in the colony's arsenal to combat crime, but also complicit in more insidious forms of settler state building and colonial population control.

The Bushranging Act

In 1830, New South Wales was beset by bushrangers. "Transported felons unlawfully at large" and engaging in robbery and housebreaking "had increased to an alarming degree."[17] "People were stopped, robbed and stripped

[13] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8 (2006): 387–409; James Belich, *Replenishing the Earth: the Settler Revolution and the Rise of the Anglo-World, 1783–1939* (Oxford: Oxford University Press, 2009); Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (London: Palgrave Macmillan, 2009); and Shino Konishi, "First Nations Scholars, Settler Colonial Studies and Indigenous History," *Australian Historical Studies* 50 (2019): 1–16.

[14] Grace Karskens, *The Colony: A History of Early Sydney* (Sydney: Allen & Unwin, 2009).

[15] Mark Dunn, *The Convict Valley: The Bloody Struggle on Australia's Early Frontier* (Sydney: Allen & Unwin, 2020), 151–86; and Stephen Gapps, *Gudyarra: The First Wiradjuri War of Resistance* (Sydney: New South, 2021).

[16] Vagrancy Act 1835 (NSW), 6 Will. IV No. 6 c 2.

[17] Bushranging Act 1830 (NSW), 11 Geo. IV No. 10.

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naked close to the Towns."[18] The military, police, magistrates and Aboriginal trackers were enlisted in coordinated efforts to hunt down bushrangers on the Cumberland Plains.[19] Although bushranging varied considerably—extending from single men to large roving groups, and from local and opportunistic robbers to wide-ranging itinerant criminals—in the 1830s fear was mounting that bushranging might culminate in a full-scale revolt.[20] To name just one example, English convict Ralph Entwistle and his "Ribbon Gang" of convict insurgents staged the Bathurst Rebellion in 1830. The gang moved from station to station in the Central Tablelands of New South Wales, robbing settlers, razing properties and recruiting convicts to their ranks as they went. With eighty convict insurgents at its peak, the gang was a force to be reckoned with. Equally concerning was the rationale behind "the Ribbon Boys'" turn to colonial crime, with allegations of tyranny and injustice under the convict system stoking government concern that the foundations of the colony were at stake.[21] In April 1830, influential free colonist John Macarthur wrote to his son that "robberies and murders" had "so multiplied" that if relief was not forthcoming, then "Martial Law must be proclaimed."[22]

Rather than pursuing martial law, Governor Ralph Darling and Chief Justice Francis Forbes lay the Bushranging Act before the Legislative Council that same month in 1830.[23] Originally enacted for only 4 years, the law was deemed to be a "temporary provision" that was merited by the "emergency of the occasion." The Bushranging Act authorized anyone to detain an individual whom they suspected of being a transported felon, illegally at large. This was not too unusual. As Justice William Burton later wrote, criminal law already allowed a private person "to arrest without a warrant . . . upon *sufficient causes of suspicion of treason or felony*."[24] Controversy surrounded the fact that the Bushranging Act reversed the burden of proof, so that the onus was on the arrested individual to prove their innocence. They could also be indefinitely held in custody while a justice of the peace deliberated their status. If the magistrate was unable to determine the suspect's freedom, they were sent to

[18] John Macarthur to John Macarthur Junior (April 10, 1830). State Library of New South Wales (hereafter SLNSW), MLA2899: MacArthur Papers Volume 3: Letters of John Macarthur to his sons, 1815–1832, CY75, 184.

[19] New South Wales State Archives (hereafter NSWSA): Department of Premier and Cabinet; NRS 906, Special Bundles [Colonial Secretary], Apprehension of Bushrangers [4/7090].

[20] Byrne, *Criminal Law and Colonial Subject*, 129–51; and McKinnon, "Convict Bushrangers of New South Wales."

[21] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Bathurst Insurrection [4/2105].

[22] John Macarthur to John Macarthur Junior (April 10, 1830). SLNSW, MLA2899: MacArthur Papers Volume 3, CY75, 184.

[23] Although only the Governor could initiate a bill, the Chief Justice needed to ensure that its contents were not "repugnant to the Laws of England, but consistent with such Laws as far as the Circumstances of the said Colony will admit" before legislation was passed. *New South Wales Act* 1823 (Imperial), 4 Geo. IV, c. 96.

[24] Justice Burton to Governor Bourke (August 25, 1834), *Historical Records of Australia* (hereafter HRA), series I, volume XVII (Canberra: Library Committee of the Commonwealth Parliament, 1923), 525. Emphasis in original.

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Sydney so that their details could be checked against the records kept by the principal superintendent of convicts. An individual's freedom was their defense to imprisonment under these clauses of the Act.[25]

Despite this convict framing, the Bushranging Act also targeted the free population. The government feared the involvement of emancipists and small-scale settlers in convicts' criminal dealings. Indeed, in his 1831 letter to Governor Darling, the Colonial Secretary worried that bushrangers would find "numerous recruits amongst the large number of persons of the very worst character who have become free while completing their term."[26] Under the Bushranging Act, the same process applied to an individual who possessed firearms as applied to an individual suspected of being a transported felon: they could be arrested by any person and forced to prove that they possessed weapons for a lawful purpose. If someone was suspected of concealing weapons, they could be searched, by anyone, without a warrant. To break underground networks of sympathizers, harborers were specifically targeted. Magistrates could issue a search warrant for any premises on "credible information" that a bushranger was harbored there. Any property a constable believed to be stolen could be seized and anyone at the premises could be arrested.[27]

Ironically, free, white, itinerant, immigrant laborers appear to have been the worst affected by the Bushranging Act. Proving one's liberty and right to freedom of movement were more difficult for free immigrants than for emancipists or convicts.[28] Emancipists carried certificates of freedom, while convicts held tickets of leave or papers from their masters granting them permission to travel. These could easily be stolen or forged by bushrangers. There was no official passport system or certificate of freedom for free immigrants and so proving one's liberty often presented a difficulty, even to the ruling elite.[29] Historian Charles Currey writes of an instance when Francis Forbes, the Chief Justice of New South Wales, was apprehended as a potential bushranger near his property at Emu Plains, while Justice James Dowling of the Supreme Court was detained on the same grounds in Sydney.[30] Although this caused embarrassment, powerful settlers were better equipped to prove their identity than newly arrived itinerant workers.

The wide reaching, discretionary powers of the Bushranging Act were intended to match the equally wide ambit of bushrangers who robbed districts the length of the colony and increasingly sprawled out beyond the bounds of settlement.[31] But such powers were also open to abuse. Despite the Legislative

[25] Bushranging Act 1830 (NSW), 11 Geo. IV No. 10, c 1-2.

[26] Viscount Goderich to Governor Darling (March 21, 1831), *HRA*, series I, volume XVI (Canberra: Library Committee of the Commonwealth Parliament, 1923), 115.

[27] Bushranging Act 1830 (NSW), 11 Geo. IV No. 10.

[28] Alexander Harris, *Settlers and Convicts* (London: G. Cox, 1852), 139–54, 407–8.

[29] Ibid., 145–46, 409; and New South Wales Legislative Council, *Report of the Committee on Police and Gaols with Minutes of Evidence* (Sydney: T. Trood, 1839), 49, 232.

[30] C. H. Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* (Sydney: Angus and Robertson, 1968), 417–18.

[31] Byrne, *Criminal Law and Colonial Subject*, 129–51; and McKinnon, "Convict Bushrangers of New South Wales."

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Council's claims to the contrary, cases of injustice were rife under the Bushranging Act. Captain T. Williams of the Mounted Police believed the Act needed to be altered to prevent the predominantly convict constabulary from "apprehending free persons upon frivolous or vexatious motives under the cloak of exercising their official functions."[32] Constables were offered a reduction of their sentences for catching bushrangers and so they often cast their net wide, detaining people without reasonable grounds in the hope they would eventually catch a bushranger. This underhand tactic was made worse by the advent of private prisons on settlers' land, as these makeshift structures could hold an innocent suspect for weeks until a magistrate visited the area.[33] Robert Stewart, a police magistrate in Campbelltown, believed that "free persons have been inconvenienced by the operation of this Act," however, after "diligent enquiries" he found insufficient proof to support these claims. This was not because these stories were falsehoods, but because perpetrators were "shielded by . . . [the Bushranging Act's] provisions."[34] One of the final clauses indemnified any person furthering the objects of the Act. If a matter went before the court and the plaintiff lost, they were liable to pay the defendant treble the cost of proceedings.[35] It is little wonder that Stewart had difficulty finding concrete evidence of the Act's abuses. This statute was designed to deter victims from seeking legal redress.

Given this apparently damning information, why was there overwhelming support for this Act? Why was the Bushranging Act repeatedly re-enacted until 1842 when it eroded free colonists' liberty?[36] In 1834 there was debate about the Bushranging Act's legitimacy, its repugnancy to the laws of England, its infringement of the rights of free subjects and potential abuses of power, but the statute was renewed due to the "unique circumstances of the colony."[37] Colonial rhetoric subtly shifted so that it was no longer the bushranging crisis, but the criminal composition of the colony that rendered the Bushranging Act essential in 1834. As one Sydney magistrate wrote, there were "differences of circumstance and . . . population" between New South Wales and the mother country that needed to be taken into consideration. Although divergent from the laws of England, there was a "reasonableness" to "restraints which a peculiar state of things imposes in this enlarged penitentiary." "No honest man with bona fide purposes can object to this [Act]."[38] The Bushranging Act was designed to protect the free and law-abiding in a

[32] Captain Williams to the Colonial Secretary (March 17, 1834), 13. Opinions of the magistrates as to the expediency of prolonging the *Bushranging Act.* Accessed via Hansard, March 30, 2021.

[33] Harris, *Settlers and Convicts*, 149–52.

[34] Robert Stewart to the Colonial Secretary (March 24, 1834), 44. Opinions of the magistrates as to the expediency of prolonging the Bushranging Act. Accessed via Hansard, March 30, 2021.

[35] Bushranging Act 1830 (NSW), 11 Geo. IV No. 10, c 9.

[36] Angela Woollacott, *Settler Society in the Australian Colonies: Self-Government and Imperial Culture* (Oxford: Oxford University Press, 2015), 158.

[37] Governor Bourke to E. B. Stanley (September 15, 1834), *HRA*, series I, volume XVII (Canberra: Library Committee of the Commonwealth Parliament, 1923), 520–36.

[38] Ibid.; P. N. Anley to the Colonial Secretary (March 10, 1834), 14. Opinions of the magistrates as to the expediency of prolonging the Bushranging Act. Accessed via Hansard, March 30, 2021.

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penal colony with a large criminal population. The curtailment of subjects' freedom of movement as well as the denial of legal safeguards were deemed necessary to combat the extent of the threat from the criminal classes. However, white criminals were not the only people considered a danger to the colony. Colonists were also concerned with the company criminals kept: they were worried about Aboriginal people.

Violence on the Frontier

At 3 p.m. on May 8, 1835, a sheep station in Berrico, the Hunter region of New South Wales, was under attack. Ten Aboriginal men were at the property. In a coordinated assault, several of these men attempted to bar the door of a hut containing four shepherds, while two others came upon the overseer, James Bugg, and beat him senseless with their waddies. Although the shepherds managed to escape, they were unarmed and immobilized upon seeing Bugg being beaten on the ground. The violence only ceased after Bugg's Aboriginal partner, Charlotte, discharged a gun at the assailants. As these two Aboriginal men retreated, the shepherds ventured 50 yards to Bugg's hut, secured guns and ammunition, and successfully prevented the remaining men from pilfering their property. But even after this show of resistance, the insurgents did not leave.[39] They remained on the station until sundown, "daring the men to come out to them." One of the shepherds, James Smith, recalled: "I said [to the assailants] the soldiers would be sent after them. They said they cared not for the soldiers, they spoke very good English. They said there were plenty more Blacks in the Bush, that they would kill all the White men in the neighbourhood."[40] The Aboriginal men had originally come to the station seeking provisions and were supplied with corn and tobacco. It was not unusual for Aboriginal people to visit the property, and James Bugg later deposed that he "did not expect from their manner that they intended doing any mischief", however this was not an isolated attack. It was the first of three such strikes on stations and shepherds' huts in the district in a month, during which five white men lost their lives.[41] These assaults quickly made headlines in the colonial press.[42]

Despite the number of firsthand witnesses, misinformation plagued representations of the attacks. George Townsend wrote to Governor Richard Bourke on June 27 to assure him that reports that five of his shepherds had

[39] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Police Port Stephens [4/2332.2], letters 35/7317, 36/6621, 35/4014; and *R. v Charley* (1835). Macquarie University. http://www.law.mq.edu.au/scnsw/Correspondence/36.htm (July 20, 2018). Taken from NSWSA: Supreme Court of New South Wales; NRS 13686, Miscellaneous correspondence relating to Aborigines, [5/1161], *R. v. Charley* (1835) No. 36; and "Government Gazette," *Sydney Gazette*, May 30, 1835, 4.

[40] *R. v Charley* (1835).

[41] Ibid.; NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Police Port Stephens [4/2332.2], letter 35/4014; and "No Title," *Australian,* May 22, 1835, 2.

[42] See footnote 46.

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been similarly killed were false.[43] The *Sydney Herald* reported that two murdered men had been eaten by Aboriginal people, that their remains had been "found with the flesh cut from the thighs and other fleshy parts."[44] This stood in stark contrast to local JP Edmund Ebsworth's emphatic claims that there was no evidence of cannibalism, and that the rumor was the product of alarm having "magnified circumstances."[45] While these untruths are easily uncovered, there is one enduring falsehood: that the Aboriginal attacks were instigated by white bushrangers.

There is no compelling evidence that bushrangers were involved in these events. Firsthand accounts of the attacks made no mention of bushrangers, yet newspapers began circulating information that four bushrangers had led the Aboriginal men in their early coverage of the case.[46] Although a party of five white bushrangers robbed a property on the upper Hunter on May 31, 1835, this was never connected to the Indigenous attacks.[47] One white man named Harvey Henley was imprisoned in Newcastle gaol on suspicion of his involvement in the Aboriginal incursions, but he was never convicted of anything more than "failing to keep the peace."[48] After speaking to local Aboriginal people, an Indigenous constable named Williams disclosed to Ebsworth that a white man had orchestrated the attacks.[49] This is the only evidence that there was white intervention and it was hearsay at best.[50] Despite the weakness of the evidence as well as the fact that colonial law did not recognize Aboriginal testimony, Ebsworth concurred with the bushranging angle.[51] This was not because he believed Williams per se, but rather that

[43] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Letters from Miscellaneous Persons, Names Starting M [4/2285.1], letter 35/4450.

[44] "Domestic Intelligence," *Sydney Herald*, June 1, 1835, 3.

[45] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Police Port Stephens [4/2332.2], letter 35/4014.

[46] "Domestic Intelligence," *Sydney Herald*, June 1, 1835, 3; "Matters Furnished by our Reporters and Correspondents," *Sydney Monitor*, June 3, 1835, 3; "The Gleaner," *Sydney Gazette,* June 4, 1835, 2; "The Andromeda," *Colonist*, June 4, 1835, 5; "Untitled," *Sydney Herald*, June 11, 1835, 2; "Depredations of the Aborigines," *Colonist*, June 11, 1835, 4; and "Domestic and Miscellaneous Intelligence," *Australian,* June 12, 1835, 2.

[47] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Letters from Miscellaneous Persons, Names Starting M [4/2284.1], letter 35/4270.

[48] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Letters from Miscellaneous Persons, Names Starting T [4/2285.1], letter 25/4405; and NSWSA: Department of Corrective Services; NRS 2374, Entrance Books [Newcastle Gaol] 1832–1848 [2/2005], roll 136, entry for "Harvey Henley."

[49] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Police Port Stephens [4/2332.2], letter 35/4014.

[50] One Aboriginal man named Charley was eventually tried and convicted for one of these deaths. Testimony at Charley's trial referred to a white man ordering Aboriginal people to kill all the whites and bring him their possessions, but this was only hearsay. Charley maintained that the death was an execution for a breach of Aboriginal law. See footnote 53.

[51] For Aboriginal people, oaths, and testimony, see Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Basingstoke: Palgrave Macmillan,

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"from this systematic organisation [of the Aboriginal attacks]" Ebsworth placed "some reliance on the report that a white man may be the instigator."[52]

Colonial conceptions of Aboriginal inferiority allowed little space for them to be organized warriors or apt strategists, let alone to be fighting to reclaim their lands or punish whites for breaches of Aboriginal law—although both factors appear to have led to the violence in 1835. Charley, an Indigenous man from the Hunter and the only person to be convicted for the attacks, claimed that he murdered a white overseer named Alfred Simmons because he broke Aboriginal law. Simmons apparently showed Charley's "murai, muari," an Indigenous amulet, to his female, Aboriginal partner when only men were permitted to view the talisman. According to Aboriginal law, this meant death for both Simmons and his Indigenous mistress.[53] Moreover, Aboriginal resistance strategies were often akin to both bushranging and guerrilla warfare.[54] As Henry Reynolds describes, in frontier violence, battle lines and territory were not clearly demarcated. "[Settlers'] Aboriginal adversaries were constantly on the move . . . they lived off the land . . . their movements were unpredictable, groups waxing and waning for no apparent reason, adopting the classical stratagems of the weak when pitted against the strong—stealth, surprise, secrecy."[55]

Aboriginal warriors often engaged in violent strikes on settlers' properties and stole food, weapons and ammunition before receding into the bush. This not only served to disrupt settlements—as colonists were put in bodily fear and their essential provisions were plundered—but assisted Aboriginal people to survive when their lands and traditional foodstuffs had been diminished or destroyed by colonization.[56] This was certainly the case in the Hunter area. Since the mid-1820s, violence between colonists and Aboriginal people had escalated in the region. Tensions rose as settlers pushed deeper into Aboriginal Country, desecrating sacred sites, taking natural resources, violating Aboriginal women, murdering Aboriginal people and breaking Aboriginal law. As a result, stations, settlers' huts and isolated travellers were increasingly targets of Aboriginal raids. Colonists often responded to these attacks with indiscriminate

2010), 57–59; and George Wood, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Sydney: Federation Press, 2002), 139–40.

[52] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Police Port Stephens [4/2332.2], letter 35/4014.

[53] *R. v Charley* (1835); NSWSA: Supreme Court of New South Wales; NRS 13705, Memoranda selected from Twenty-Four Years of Missionary Engagements in the South Sea Islands and Australia, by Lancelot Edward Threlkeld, Missionary to the Aborigines, New South Wales, 1838 [5/1123]; Neil Gunson, ed., *Australian Reminiscences and Papers of L. E. Threlkeld: Missionary to the Aborigines, 1824–1859* (Canberra: Australian Institute of Aboriginal Studies, 1974), 50–51, 122; "Untitled," *Sydney Gazette*, June 27, 1835, 2; "Supreme Court," *Sydney Monitor*, August 26, 1835, 4; "Tomorrow," *Sydney Herald*, August 27, 1835, 3; and "Domestic Intelligence," *Sydney Herald*, September 3, 1835, 2.

[54] Meg Foster, *Boundary Crossers: the hidden history of Australia's other bushrangers* (Sydney: NewSouth Publishing, 2022), 110-112; and Stephen Gapps, *The Sydney Wars: Conflict in the Early Colony, 1788–1817* (Sydney: NewSouth Publishing, 2018).

[55] Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Sydney: Allen & Unwin, 1996), 8.

[56] Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia* (Melbourne: Penguin Books, 1990); and Reynolds, *Frontier*.

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violence towards Indigenous people.[57] And this, in turn, increased Aboriginal retaliatory attacks. Such was the cyclical nature of frontier violence.

Despite this evidence, understanding the Berrico attacks through the lens of Aboriginal law or frontier warfare was difficult for colonists. Recognizing these motives would not only shake settlers' confidence in their own superiority, but also their claims to sovereignty over the land. When the colonizers came to New South Wales, they defined the land as *terra nullius*; land belonging to no one.[58] While justices had previously recognized the existence of Aboriginal law (and therefore some degree of dual jurisdiction) the Crown prerogative was tightening in the 1830s. By 1836, judges in *R. v Murrell and Bummaree* would explicitly rule that Aboriginal people were amendable to colonial law, even in *inter se* matters.[59] The possibility that Aboriginal attacks could be resistance fighting was at odds with this understanding of sovereignty and colonial jurisdiction. The majority of colonists preferred to view Aboriginal violence as a result of the "irrational impulses" of "bloodthirsty savages."[60] But when there was irrefutable evidence of strategy and coordination in their attacks—as in the case of the Berrico outbreak—it was less disruptive to normative understandings of colonization if Aboriginal violence was orchestrated by nefarious whites.

This idea of white leaders also gained traction because it played into colonists' fears about bushranging, Indigenous people and rebellion. At the same time that frontier warfare was waged, free colonists perceived their convict workers to be a threat. Only 2 years before the Berrico incident, crisis was slimly averted at another remote property in the Hunter area. The 1833 Castle Forbes revolt saw six convicts rob their station of weapons and abscond into the bush only to quickly return, intent on looting the property and murdering one of their masters. The convicts later claimed they were driven to such measures due to the unjust treatment they had received at the station.[61] Concerned colonists and the colonial authorities did not treat this as an isolated incident. In the aftermath of the Castle Forbes revolt an inquiry was conducted into convict management, and the episode "propelled formative local debates over the purpose and future of transportation to New South Wales."[62]

[57] Dunn, *The Convict Valley*, 151–86.

[58] Andrew Fitzmaurice, "The Genealogy of *Terra Nullius*," *Australian Historical Studies* 38 (2008): 1–15; and Stuart Banner, "Why *Terra Nullius*? Anthropology and Property Law In Early Australia," *Law and History Review* 23 (2005): 95–132.

[59] *R. v Murrell and Bummaree* (1836). Macquarie University. http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree (March 20, 2021). Taken from *R. v Murrell and Bummaree* (1836) 1 Legge 72; [1836] NSWSupC 35; and Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836* (Cambridge, MA: Harvard University Press, 2010).

[60] Larissa Behrendt, *Finding Eliza: Power and Colonial Storytelling* (St Lucia, QLD: University of Queensland Press, 2016); and Liz Connor, *Skin Deep: Settler Impressions of Aboriginal Women* (Perth: UWA Press, 2016).

[61] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Convicts Part IV: Miscellaneous [4/2182.1]; and Lisa Ford and David Andrew Roberts, "The Convict Peace: The Imperial Context of the 1833 Convict Revolt at Castle Forbes," *Journal of Imperial and Commonwealth History* 49 (2021): 1–21.

[62] Ford and Roberts, "The Convict Peace," 2.

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From this context it is easy to see how in 1835, the idea that white marauders could recruit not only convicts, but Aboriginal men to their ranks at Berrico was too much for many colonists to bear. "The blacks, at any time dangerous when exasperated, become doubly so when headed by European robbers, who have death before them, whether they fall openly in a field, or expiate for their crimes upon the scaffold," cautioned the *Sydney Gazette*.[63] The assaults at Berrico and its surrounds brought home how isolated settlers were at the fringes of the frontier, as well as their desperate need of protection. The seventeenth regiment had to travel more than 250 km from their base in Sydney to reach the besieged areas. There was no permanent force stationed in those outlying districts, and soldiers were apparently fearful of shooting Aboriginal people, lest they be charged with murder.[64] This concern was characteristic of the period, as remote settlers demanded increased government protection and policing. Although the Mounted Police had been created in 1825 specifically to put down trouble by escaped convicts, its numbers, range and resources were insufficient to combat such pervasive threats.[65] If white bushrangers, convicts and Aboriginal people united, then isolated and underresourced colonists could be completely overrun. This was a frightening prospect indeed.

In 1835, when stories spread about bushrangers leading Aboriginal insurgents, the Bushranging Act had only just been re-enacted and debates over its necessity had only just ceased. Settlers were well aware of the legislation designed to deter convict banditry. Rather than suggest any changes in this area, public opinion shifted to the issue of consorting. The bushranging emergency had apparently been resolved (or at least reduced) due to the Bushranging Act, but there was no provision to prevent white men from fraternizing with Aboriginal people; nothing to prevent the "nefarious influence" of the criminal classes from crossing the racial divide. This is where the Vagrancy Act came in.

The Vagrancy Act

In June 1835, the authorities were still on the hunt for Aboriginal insurgents in and around Berrico. During a reconnaissance mission, a search party happened across a suspicious white man whom they took into custody. Although this man was "covered with rags" and in a "most filthy and squalid condition" he

[63] "Advance Australia," *Sydney Gazette*, June 13, 1835, 2.

[64] NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Police Port Stephens [4/2332.2], no letter bundle, H. Dumaresq to the Colonial Secretary (May 18, 1835), letter 35/4014; "Domestic Intelligence," *Sydney Herald*, June 1, 1835, 3; "Advance Australia," *Sydney Gazette*, June 11, 1835, 2; "Untitled," *Sydney Herald*, June 11, 1835, 2; "Depredations of the Aborigines," *Colonist*, June 11, 1835, 4; "Native Blacks," *Sydney Monitor*, June 13, 1835, 2; and NSWSA: Department of Premier and Cabinet; NRS 905, Main Series of Letters Received [Colonial Secretary], Letters from Miscellaneous Persons, Names Starting M [4/2284.1], letter 35/4270.

[65] Acting Governor Stewart to Earl Bathurst (December 12, 1825), *HRA*, series I, volume XII, 85–86; and Dunn, *The Convict Valley*, 160–61.

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appeared well versed in his legal rights. Upon his arrest, the man "discoursed most eloquently on his rights as a *free subject*; talked of his right to choose his own company and threatened . . . prosecution in the Supreme Court." This dishevelled activist changed his tune once he was committed for trial. He subsequently claimed to have been "kept prisoner by the blacks," led police to "their encampment" and assisted in the arrest of two Aboriginal men. Yet this about face was not enough to placate the *Sydney Herald* who reported it.[66]

Many elements of this story were distressing for a respectable colonial audience. Such an encounter with a filthy, degraded white was a reminder of the perils of the colonial project. Britons asserted their physical, cultural and moral superiority as justification for empire, but there was a tension between this view and the realities of life in New South Wales. There was concern among men of science that environment might change the population: that whites might regress into savagery when moved from the mother country into an alien land.[67] The "squalid" man who was arrested in 1835 was by no means the first white man found to have thrown off the garb of civilization to live with "the natives."[68] Moreover, the convict population in the colony called the morality of colonization into question. "Exclusives"—men who believed convicts were incapable of reform—espoused convicts' moral corruption in order to protect their own status and prestige.[69] This encounter with a "filthy," "squalid" free man could have strengthened the exclusives' claims of the threat posed by emancipists in the colony. However, when convicts composed almost 40% of the colony's population, the moral impetus for colonization was somewhat diminished.[70] Populating Aboriginal lands with degenerate criminals did not sit well with the view of an enlightened colonial project.

More troubling than the idea that the "squalid" man might have had convict origins was the fact that he was free. There were extensive legal checks in place for convicts. They were the responsibility of either government or private masters, which meant that (at least in theory) convicts were under surveillance and could be punished by local magistrates for any misdemeanor.[71] Tickets of leave provided a convict with nominal freedom as long as they stayed in a

[66] "Untitled," *Sydney Herald*, June 11, 1835, 2. From the context, it appears that this man may have been Harvey Henley. See note 48.

[67] Richard White, *Inventing Australia: Images and Identity, 1688–1980* (Sydney: Allen & Unwin, 1985), 66–68.

[68] Charles Barrett, *White Blackfellows: The Strange Adventures of Europeans Who Lived among Savages* (Melbourne: Hallcraft, 1848); and Stephen Gray, "Going Native: Disguise, Forgery, Imagination and the 'European Aboriginal'," *Overland* 170 (2003): 34–42.

[69] David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge: Cambridge University Press, 1991), 18; David Neal, "Law and Authority: The Magistracy in New South Wales, 1788–1840," *Law in Context: A Socio-Legal Journal* 3 (1983): 46–47; and Sandra Blair, "The Felonry and the Free? Divisions in Colonial Society in the Penal Era," *Labour History* 45 (1983): 1–16.

[70] In 1833, 23,224 people in New South Wales were convicts out of a total of 59,652. J. C. Caldwell, "Population," in *Australians: Historical Statistics*, ed. Wray Vamplew (Sydney: Fairfax, Syme and Weldon Associates, 1987), 26; and Governor Bourke to E. G. Stanley (September 15, 1834), *HRA*, series I, volume XVII, 532.

[71] John Hirst, *Convict Society and Its Enemies: A History of Early New South Wales* (Sydney: Allen & Unwin, 1983); and Ford, *The King's Peace*, 188–89.

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designated region. If they became troublesome or engaged in criminal activities, their ticket of leave could be rescinded.[72] Emancipists and free emigrants of the lower classes were different. Although "exclusives" and the ruling elite increasingly believed that these free subjects were akin to convicts in their criminal disposition, they were not subject to the same surveillance or control as their convict brethren. Freedom was not enough to guarantee a white man's morality or civilization. And there was concern among the colonial elite and government that the current law was not sufficient to deal with these issues.

Prior to 1835 and the introduction of the Vagrancy Act, vagrancy was an amorphous legal category in New South Wales.[73] Vagrancy offenses were common in the early years of the colony. Governor Lachlan Macquarie's Police Regulations of 1811 explicitly targeted "idle and disorderly persons," "rogues and vagabonds" and "incorrigible rogues" in its provisions.[74] As Andrew McLeod writes, "without forbidding vagrancy in terms, these measures visited serious consequences on those exhibiting its features."[75] Despite the absence of any nominal vagrancy law, there were convictions for vagrancy as early as 1812: it is just unclear under what legal provision these convictions were made.[76] The Australian Courts Act of 1828 confirmed that New South Wales had inherited "all laws and statutes in force within the realm of England . . . *so far as the same can be applied within the . . . colonies*" upon colonization in 1788.[77] This led at least some of the judiciary to believe that English vagrancy law was in force in New South Wales. To the 1835 Committee into Police and Gaols, for example, first police magistrate, Colonel Henry Wilson, stated "I conceive we are authorised by the English Vagrancy Act to deal with all idle and disorderly persons, rogues and vagabonds, and incorrigible rogues, according to the provisions of that Act."[78] William Gunn, a JP from Van Diemen's Land, reported the same belief in his colony.[79] However, it appears that Wilson and Gunn were in the minority with these views.

Newspapers used the Berrico attacks to launch a campaign for a colonial vagrancy statute. In June 1835, for instance, the *Sydney Herald* declared that the "commotion" in the Hunter area "has drawn the attention of the Public, in the most marked manner, to the palpable deficiency which exists in our police department from the absence of a Vagrancy Act."[80] The *Colonist* followed suit, claiming that "In consequence of the depredations and murders

[72] NSWSA, "NRS-15989: Original Tickets of Leave and Conditional Pardons." https://search.records.nsw.gov.au/permalink/f/1ebnd1l/ADLIB_RNSW110015817 (April 6, 2021).

[73] Vagrancy Act 1835 (NSW), 6 Will. IV No. 6.

[74] Governor Macquarie to Earl of Liverpool (October 18, 1811), *HRA*, series I, volume XVII (Canberra: Library Committee of the Commonwealth Parliament, 1916), 406–8.

[75] McLeod, "The Origins of Consorting Laws," 114.

[76] Byrne, *Criminal Law and Colonial Subject*, 161.

[77] Although this legal inheritance was largely assumed before 1828, it became formalized in the Australian Courts Act, 1828 (NSW), 9 Geo. IV, c. 83, s. 24. http://www.legislation.act.gov.au/a/db_1785/19870112-2268/pdf/db_1785.pdf (August 12, 2017).

[78] New South Wales Legislative Council, *Minutes of Evidence Taken Before the Committee on Police* (Sydney: Government Printer, 1835), 36.

[79] Ibid., 6.

[80] "Sworn to No Master of No Sect Am I," *Sydney Herald*, June 15, 1835, 2.

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committed by the blacks, headed, we understand, by bushrangers . . . There ought surely to be a Vagrancy Act passed to enable the Executive to seize and punish all persons at large in this way."[81] It seems that majority of colonists neither believed that English vagrancy law was in force in the colony, nor did they wish for the English statute to be transplanted from one jurisdiction to the other. The English Vagrancy Act (1824) was predominately seen as an extension of Poor Laws which did not exist in the Australian colonies.[82] In popular consciousness, the English Act was tied to the administration of alms, management of the poor and immobilization of an otherwise itinerant class of paupers. This was not the Act required in New South Wales. As in the case of the Bushranging Act, settlers demanded that a new statute be fashioned with the colony's unique conditions in mind.

The Unique Circumstances of the Colony

The New South Wales Vagrancy Act included a clause that was unprecedented in Britain and its empire.[83] Under clause 2 of the Act, it was an offense for any non-Indigenous person to be "found lodging or wandering with any black native of the Colony" unless they could satisfy a justice of the peace that they were there for a legitimate purpose.[84] The "squalid" settler's claim to freedom of association was no longer valid. Free settlers could not "choose their own company" when it came to Aboriginal people.[85] There was some ambiguity as to whose interests this clause served. The champion of the colonial Vagrancy Act, the *Sydney Herald,* wrote ambiguously that "the mode in which free men as well as Convicts are found to join the blacks, points out the absolute necessity that exists for the enactment of a Vagrancy law."[86] The *Colonist* was similarly cryptic, describing the Act as "not less necessary for the protection of the black natives than of that of the whites."[87]

There were several elements to the "protection" envisaged by the "natives" clause. Most obvious was the protection of Aboriginal people from the harassment or corruption of criminal whites. Although this provision may have been informed by the humanitarian movement that was gaining influence at this time, the provision was not altruistic on the colonizers' part.[88] By limiting

[81] "Depredations of the Aborigines," *Colonist*, June 11, 1835, 4.

[82] "Monday, June 15, 1835," *Sydney Herald*, June 15, 1835, 2.

[83] McLeod, "The Origins of Consorting Laws," 124; Kimber, "Poor Laws," 539; and Alex Steel, "Consorting in New South Wales: Substantive Offence or Police Power?" *UNSW Law Journal* 26 (2003): 581.

[84] Vagrancy Act 1835 (NSW), 6 Will. IV No. 6.

[85] "Untitled," *Sydney Herald*, June 11, 1835, 2.

[86] "Sworn to No Master, of No Sect Am I," *Sydney Herald*, June 11, 1835, 2.

[87] "Depredations of the Aborigines," *Colonist*, June 11, 1835, 4.

[88] Alan Lester and Fae Dussart, *Colonisation and the Origins of Humanitarian Governance: Protecting Aborigines across the Nineteenth Century British Empire* (Cambridge: Cambridge University Press, 2014); Elizabeth Elbourne, "The Sin of the Settler: The 1835–36 Select Committee on Aborigines and Debates Over Virtue and Conquest in the Early Nineteenth-Century British White Settler Empire," *Journal of Colonialism and Colonial History* 4 (2003); and Kirsten McKenzie, "Discourses of

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or regulating contact between racial groups, the government also hoped to prevent whites from inciting Aboriginal people to violence. The authorities feared that bushrangers might use Aboriginal people to attack settlers and plunder colonists' property, that a white in company with "Aboriginal natives" might "furnish them with arms, gunpowder or spiritous liquors" that could be used against settlers and that liaisons between white men and Aboriginal women would provoke Indigenous men to attack.[89] While there is some space for colonial wrongdoing, there is little recognition of Aboriginal agency in this schema. Each of these anxieties stemmed from the idea that criminal white men were pulling the strings. But as we know from the case of the "squalid" white man, the "natives" clause was just as important for preventing whites from fraternizing with perceived "savages"; for preventing the degradation and moral decay of the British race.

The Vagrancy Act sought to prevent contact between Aboriginal people and criminal colonists by focusing on whites. In British common law, vagrancy was designed first and foremost to limit the mobility of the population but there was no restriction of Aboriginal people's movement under the New South Wales Vagrancy Act.[90] Indeed, well into the 1860s, parliamentarians argued that Aboriginal people were excluded from the New South Wales Act.[91] This would come to stand in stark contrast to vagrancy law in the Port Phillip, South Australian and Western Australian colonies, where vagrancy statutes were used to move Aboriginal people into designated areas such as missions or reserves, and bring them under increasing colonial control.[92] What these three colonies had in common was that they were not predominately penal in nature. They were not faced by the same threat of convict, emancipist and nefarious free settler populations as New South Wales. The New South Wales Vagrancy Act was designed primarily to blunt the threat of these high-risk, non-Indigenous groups. It was framed in the same manner as the Berrico incidents, with free white men as the root of concern.

Non-Indigenous people had their movement curtailed by the New South Wales Vagrancy Act. Police had the right to stop any suspicious person and force them prove that they had "visible, lawful means of support" and "a lawful fixed place of residence."[93] In theory, the authorities could "apprehend and correct in a summary manner rogues and vagabonds whether free or bond" under vagrancy law, but the Bushranging Act provided greater powers and

Scandal: Bourgeois Respectability and the End of Slavery and Transportation at the Cape and New South Wales," *Journal of Colonialism and Colonial History* 4 (2003).

[89] "Sworn to No Master of No Sect Am I," *Sydney Herald*, June 15, 1835, 2; and "Untitled," *Australian*, June 12, 1835, 2.

[90] Kimber, "'A Nuisance to the Community,'" 276–77; Davies, "Vagrancy and the Victorians," 115–25; and McLeod, "The Origins of Consorting Laws," 106–14.

[91] "Legislative Assembly," *Sydney Morning Herald*, April 6, 1866, 3; and "Legislative Assembly," *Maitland Mercury*, April 10, 1866, 2.

[92] Amanda Nettelbeck, "Creating the Aboriginal Vagrant: Protective Governance and Indigenous Mobility in Colonial Australia," *Pacific Historical Review* 87 (2018): 79–100.

[93] Vagrancy Act 1835 (NSW), 6 Will. IV No. 6.

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harsher penalties to control the convict population.[94] Vagrancy law was necessary because it targeted those who were free. The Vagrancy Act was designed to prevent any roving, itinerant lifestyle among the lower classes of colonists who might be disposed to crime. Immobile colonists had less opportunity to commit crimes with impunity than itinerant settlers. They were under greater surveillance, easier to trace and more directly under colonial control. This was the logic behind placing residency requirements on convicts' tickets of leave.[95] And now, under the Vagrancy Act, the same standard could be applied to those who were free.

The Act also helped to promote settlement at a time when the demographics of the colony were changing. New South Wales was not designed as a prison, but as an agrarian society. The aim was for convicts and settlers to be self-sufficient, as well as provide resources for Britain and its empire. This required colonists to settle and develop the land. In the early years of the colony, when the population was predominately convicts, the government had control of the labor market. The Governor might provide an ex-convict with a parcel of land so long as they tilled the soil, while convict labor could be directed to the public works and agricultural pursuits that the government and private settlers deemed most pressing.[96] By the 1830s, there was a growing free and emancipist working population. Free settlers and ex-convicts were not beholden to the desires of the government. They might settle, but they could also choose to be itinerant workers. They could move from place to place searching for the best jobs and conditions, and bargain with their prospective masters about the terms of their employment.[97] The Vagrancy Act provided a legal mechanism by which the government could control the labor population of New South Wales, encourage emancipists and other free laborers to settle, and deter any roving lifestyle. It was designed to control free settlers by hampering their mobility.

There was a great irony in this approach. Empire required mobility: the movement of people and goods from the metropole to the far flung reaches of the globe and back, as well as the expansion of colonial frontiers.[98] As

[94] Governor Bourke to E. G. Stanley (September 15, 1834), *HRA*, series I, volume XVII, 531; Bushranging Act 1830 (NSW), 11 Geo. IV No. 10; and Transported Offenders and Suspected Robbers Apprehension Act 1834 (NSW), 5 Will IV No 9.

[95] NSWSA, "NRS-15989: Original Tickets of Leave and Conditional Pardons."

[96] Karskens, *The Colony*; Stephen Nicholas, ed., *Convict Workers: Reinterpreting Australia's Past* (Cambridge: Cambridge University Press, 1988); and Hirst, *Convict Society and Its Enemies.*

[97] Once a worker secured employment, they and their employer were subject to the Masters and Servants Act. Masters and Servants Act 1828 (NSW), 9 Geo. IV No. 9; and Hirst, *Convict Society and Its Enemies,* 101.

[98] Tony Ballantyne, "Mobility, Empire, Colonisation," *History Australia* 11 (2014): 7–37; Kate Fullagar and Mike McDonnell, eds., *Facing Empire: Indigenous Experiences in a Revolutionary Age* (Baltimore: John Hopkins University Press, 2018); David Lambert and Alan Lester, eds., *Colonial Lives across the British Empire: Imperial Careering in the Long Nineteenth Century* (Cambridge: Cambridge University Press, 2006); Alan Lester and Zoë Laidlaw, eds., *Indigenous Sites and Mobilities: Connected Struggles in the Long Nineteenth Century* (London: Palgrave Macmillan, 2015); Tracey Banivanua Mar, *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge: Cambridge University Press, 2016); and Tony Ballantyne and Antoinette Burton,

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Amanda Nettelbeck has written, "the movement of European people was accepted as a vital sign of colonial progress and modernity."[99] Mobility—the force at the heart of the colonial project—was now actively suppressed. Several decades after the British establishment of New South Wales, the authorities were more discerning about who had a right to movement. "The movement of colonised populations was characteristically regarded as a sign of their essential nomadism and, by extension, their absence of civilisation," excessive mobility among colonists could mitigate against a settled, agrarian society, and the movement of deviant free subjects threatened the colonial authorities.[100] Unbridled movement could damage the colonial project. And the Vagrancy Act blunted the force of this threat.[101]

This is not to say that all settlers welcomed the Vagrancy Act. The *Sydney Gazette* in particular was opposed to any vagrancy measure, which it saw as an attempt to erode the freedom of free subjects. The paper described a circumstance whereby a constable could stop any person and force them to give an account of themselves, their residence and their livelihood as akin to slavery: a claim with particular resonance considering that slavery was nominally abolished in the British Empire 2 years previously.[102] It was not only the interrogation itself, but the constables entrusted with this mandate that offended the *Gazette*. "Ruffianly constables are already vested with too great an extent of unconstitutional powers, without adding to it the right to interrogate free men, in any part of the colony, and of enforcing an answer to their insolent queries . . . it [the Vagrancy Act] is in its general character opposed to those principles of personal freedom which it is the boast of the British constitution to recognise and protect."[103] Remembering that constables were predominately convicts or ex-convicts at this time, the concerns of the *Sydney Gazette* become those of unfree convicts or recently freed emancipists demanding information from free persons.[104] Not only were the rights of free subjects eroded under the Vagrancy Act. The men with the power to call free subjects to account were often convicted criminals.[105]

eds., *Moving Subjects: Gender, Mobility and Intimacy in an Age of Global Empire* (Urbana, IL: University of Illinois Press, 2009).

[99] Nettelbeck, "Creating the Aboriginal Vagrant," 80.

[100] Ibid.

[101] Coleborne, "Mobility Stopped in its Tracks," 87–103.

[102] The Slavery Abolition Act 1833 (United Kingdom), 3 & 4 Will. IV, progressively freed slaves over a number of years. Most slaves had to undergo a period of "apprenticeship" to their former masters before they were free, and 1838 is generally considered the year that slavery was abolished in the British Empire. Kate Boehme, Peter Mitchell and Alan Lester, "Reforming Everywhere and All at Once: Transitioning to Free Labor across the British Empire, 1837–1838," *Comparative Studies in Society and History* 60 (2018): 688–718. It is worth noting that Vagrancy Law was used to control the recently freed, ex-slave population in the Caribbean after emancipation in 1838. See note 2 for details.

[103] "Advance Australia," *Sydney Gazette*, June 24, 1834, 2.

[104] Neal, *The Rule of Law in a Penal Colony*, 9, 141–65.

[105] There were complaints that convict constables interfered with free people before the Vagrancy Act. See for example Hannibal Macarthur to P. P. King (April 18, 1823). SLNSW, MLA 1976: King Family Papers Vol. 1, Correspondence, 1799–1829, CY904, 261.

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The upper echelons of society were not the only ones who opposed encroachments on their freedom. From what we know of lower-class culture, many small-scale settlers and emancipists believed that they should be free from police interference too. Freed persons had been refusing arrests and searches without warrants as early as 1817. The police "were actively resisted by persons claiming that they are 'free', meaning they should not be treated as if they are convicts."[106] In Parramatta and Sydney in particular, battles raged "over freedom and the rights of free or freed persons in the streets and in their houses."[107] These appeals served a strategic purpose. As Paula Byrne compellingly describes, the request for a warrant, for example, "could have resulted from a number of situations: the defendant could have wished to gain more time, to hide convicts or stolen property or could have felt his rights were threatened by a constable."[108] The lower classes leveraged discourses about freedom to further their own ends. And as they fought to ensure that freedom from bondage and freedom from police interference went hand in hand, it is unlikely the Vagrancy Act found support among this group.

Despite these instances of resistance, the Vagrancy Bill passed into law with no amendments and little fanfare in 1835. While some settlers remained disgruntled that convict constables could interfere in their business, the Act's necessity was widely accepted. Freedom from bondage did not guarantee that a colonial subject would abide by the law. At a time when the numbers of the "undesirable" free population swelled, the Vagrancy Act was passed to stymie the development of a free criminal class.

From Convict Concerns to Free Colonists

The Bushranging Act and the Vagrancy Act were employed in concert. While there were many similarities between the two statutes—not least the discretion they provided to arrest suspicious characters, and their reversal of the presumption of innocence—together, they provided a strong legal framework to control dangerous free and unfree elements of colonial society. The Bushranging Act was cast as an act to control absconding convicts. Despite the fact that it predominately inconvenienced free itinerant workers and that free subjects might also be detained for robbery, illicit arms possession and consorting with felons, the Bushranging Act was depicted as an addition to the repertoire of convict laws. After all, freedom was a suspect's defense to arrest under the first clauses of the Act. Justice Burton, then recently arrived in New South Wales from the Cape in 1832, seems to have taken this convict framing at face value.[109] In his fervent opposition to the Bushranging Act's re-enactment in 1834, Burton claimed that "the political and moral character

[106] Byrne, *Criminal Law and Colonial Subject*, 168.

[107] Ibid., 196.

[108] Paula Byrne, "'The Public Good': Competing Visions of Freedom in Early New South Wales," *Labour History* 58 (1990): 82.

[109] K. G. Allars, "Burton, Sir William Westbrooke (1794–1888)," *Australian Dictionary of National Biography*. https://adb.anu.edu.au/biography/burton-sir-william-westbrooke-1857 (April 1, 2020); and Currey, *Sir Francis Forbes*, 419.

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of the people of the colony" had improved due to the increased number of free subjects in New South Wales. As the 1834 rationale behind the Bushranging Act was to guard against the criminal composition of the colony, the judge reasoned that there were insufficient grounds for the legislation to be re-enacted.[110] While it was true that there were more free subjects in the colony than ever before, Burton's pronouncement failed to recognize the anxiety that large segments of this free population caused the ruling classes. With little experience in New South Wales or understanding of this veiled yet deeply felt threat, it is little wonder that Burton was unsuccessful, and his argument was strenuously rejected by Chief Justice Forbes.[111]

Although the Bushranging Act affected free subjects on the ground, its convict framing meant that it did not sufficiently tackle the threat of the free and recently freed population in public discourse. According to New South Wales Police Superintendent, Captain Francis Rossi, ex-convicts became a danger to colonial society from almost the moment they were emancipated. In his 1826 annual report to Governor Darling, for example, Rossi expressed his belief that emancipists who came to Sydney to collect their certificates of freedom were a blight on the town ". . . being generally of loose, dissolute, and frequently of a desperate description of Character, abandoned to Idleness and Profligacy, they remain in Sydney as a place where they can with greater facility commit Robberies, and have always at hand some of their old associates and confederates, ready to aid and assist them in carrying to affect their nefarious plans and contrivances."[112] Here again we can see the perceived connection between mobility, "idleness and profligacy," consorting and a turn to crime. Instead of seeing the completion of convicts' sentences as a sign of their reformation, Rossi believed that these people were more disposed to crime once they were free. After living relatively cloistered lives in remote districts of the colony, a taste of freedom alongside the temptations of the town were apparently too much for many emancipists. The Superintendent cautioned that "these evils must necessarily increase as Persons of this description become free."[113] A perfect storm of criminal possibility awaited newly liberated convicts in Sydney. In contrast to Burton's claims, convicts' freedom presented more issues than it solved to men of the ruling elite like Rossi. Free persons were not controlled in the same way as their convict brethren, and so the Vagrancy Act picked up where Bushranging Act left off.

The Vagrancy Act had distinct advantages over the Bushranging Act when it came to mitigating the threat of free persons to the colony. For one thing, there was a stronger legal foundation for the Vagrancy Act than for the Bushranging Act. While the Bushranging Act was always cast as a temporary measure and needed to be re-enacted at regular intervals, the Vagrancy Act

[110] Governor Bourke to E. B. Stanley (September 15, 1834), *HRA*, series I, volume XVII, 524–33.
[111] Ibid., 520–36.
[112] Governor Darling to Earl Bathurst (June 15, 1827), *HRA*, series I, volume XII (Canberra: Library Committee of the Commonwealth Parliament, 1919), 679.
[113] Ibid.

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had a strong common law and legislative foundation in England.[114] There was little chance of accusations that it was incompatible with the laws of the mother country.[115] Indeed, in justifying the continuance of the Bushranging Act in 1834, Chief Justice Forbes noted that several controversial clauses of the bushranging legislation had legal precedent in the English Vagrancy Act (1824) and used this legal inheritance to justify the bushranging statute. According to Forbes "the local act does nothing more [than the English act]; the details differ in some particulars from the [English] Vagrancy Act, but there is no difference in principle." Where the laws diverged was again explained by the different circumstances of each locale. The "English Act provides a remedy co-extensive with the mischief in England; the local Act provides for a more extensive local mischief."[116]

As well as its strong foundation in English law, the New South Wales Vagrancy Act was a more enduring solution than the Bushranging Act to the issue of criminal characters in the colony. By 1835, when the Vagrancy Act was passed, there were already signs that transportation might not continue long into the colony's future. Although the average number of convicts had doubled each year in the 1820s, there was a backlash against such a large criminal contingent entering the colony. As a result, Governor Darling complained to the Colonial Office and numbers were reduced in 1831.[117] In Britain and the Australian colonies, penal policy underwent significant changes in the 1830s, and an anti-transportation movement gained increasing power in this decade.[118] The 1837 Molesworth Committee was created to inquire into transportation, and its highly partial investigations "discovered" moral depravity, slave-like convict conditions and the failure of transportation to reform offenders or deter them from committing crime.[119] After a decades long battle, the anti-transportation movement was ultimately successful, as convicts ceased being sent to New South Wales in 1840.[120] Although the convict population was still an issue in 1835 at the time the Vagrancy Act was passed, the

[114] Eburn, "Outlawry in Colonial Australia," 106–26; Kimber, "'A Nuisance to the Community,'" 276–77; and Susanne Davies, "Vagrancy and the Victorians: the Social Construction of the Vagrant in Melbourne, 1880–1907" (PhD diss., University of Melbourne, 1990), 115–25.

[115] This was a criticism of the Bushranging Act. Governor Bourke to E. B. Stanley (September 15, 1834), *HRA*, series I, volume XVII, 524–33.

[116] Governor Bourke to E. G. Stanley (September 15, 1834), *HRA*, series I, volume XVII, 535.

[117] McKinnon, "Convict Bushrangers of New South Wales," 10.

[118] Penelope Edmonds and Hamish Maxwell-Stewart, "'The Whip Is a Very Contagious Kind of Thing': Flogging and Humanitarian Reform in Penal Australia," *Journal of Colonialism & Colonial History* 17 (2016); and David Andrew Roberts, "Beyond 'the Stain': Rethinking the Nature and Impact of the Anti-Transportation Movement," *Journal of Australian Colonial History* 14 (2012): 205–79.

[119] British House of Commons, *Report of the Select Committee of the House of Commons on Transportation* (London: Henry Hopper, 1838); and John Ritchie, "Towards Ending an Unclean Thing: the Molesworth Committee and the Abolition of Transportation to New South Wales, 1837–1840," *Australian Historical Studies* 17 (1976): 144–64.

[120] Although there was a brief resurgence of convict transportation in the late 1840s, Bruce Kercher argues that transportation to New South Wales effectively ended in 1840. Bruce Kercher, "Perish or Prosper: the Law and Convict Transportation in the British Empire, 1700–1850," *Law and History Review* 21 (2003): 564, 581.

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murmurings of this anti-transportation movement were apparent in the 1830s. The ruling classes began to see that convicts might not be the greatest threat to the colony, and vagrancy law provided a long-lasting and convenient safety net to guard against the increasing influence of nefarious free whites.

While the Bushranging Act was allowed to lapse in 1842—once transportation had ended and the bushranging threat was deemed largely over—vagrancy law has endured.[121] Vagrancy offenses increased at the turn of the twentieth century, but by this time, nefarious, free, bush-dwelling whites were not the chief concern. In the late 1800s and early 1900s, vagrancy law targeted "undesirables" such as lower-class women and Chinese in urban centers.[122] In New South Wales, vagrancy legislation was absorbed into Summary Offences Acts in the 1970s and 1980s. Vagrancy has since been decriminalized, but public order offenses with wide discretionary powers that target amorphous categories such as "disorderly persons," remain.[123] Vagrancy law has come full circle, as yet again "without forbidding vagrancy in terms, these measures visited serious consequences on those exhibiting its features."[124] First Nations Australians are the most overpoliced population in the world, and are regularly the targets of public order offenses.[125] Indigenous Australians are 11 times more likely to be denied bail and remanded in custody. As First Nations people are more likely to be imprisoned than non-Indigenous Australians, they are also more likely to die in police custody than non-Indigenous Australians.[126] While vagrancy law in New South Wales might have begun by focusing on white colonists, its legislative legacies disproportionally affect First Nations Peoples. Wide-ranging, discretionary powers are still incredibly useful to the Australian settler state.[127]

Conclusion

The Bushranging Act (1830) and the Vagrancy Act (1835) were designed to protect New South Wales during a critical period of the colony's history. Although British law lay the foundation of these legislative interventions, it did not determine them. These statutes were tailored to the "unique circumstances of the colony": they were fashioned to respond to threats posed by convicts,

[121] Woollacott, *Settler Society*, 158.

[122] See footnote 11.

[123] Paul Gregoire and Ugur Nedim, "Policing the Poor: The History of Vagrancy Laws and the Criminalisation of Homelessness," New South Wales Courts. https://nswcourts.com.au/articles/policing-the-poor-the-history-of-vagrancy-laws-and-the-criminalisation-of-homelessness/ (December 6, 2021).

[124] McLeod, "The Origins of Consorting Laws," 114.

[125] Thalia Anthony and Eileen Baldry, "Fact Check: Are First Australians the Most Imprisoned People on Earth?" *The Conversation*, June 6, 2017. https://theconversation.com/factcheck-are-first-australians-the-most-imprisoned-people-on-earth-78528 (December 15, 2021).

[126] "The Facts About Australia's Rising Toll of Aboriginal Deaths in Custody," *Guardian Australia,* April 9, 2021. https://www.theguardian.com/australia-news/2021/apr/09/the-facts-about-australias-rising-toll-of-indigenous-deaths-in-custody (December 12, 2021).

[127] Gregoire and Nedim, "Policing the Poor."

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emancipists and nefarious free settlers, as well to as curtail their relationships with Aboriginal people. No scholar has recognized the connection between the two acts before now, yet an investigation of their origins demonstrates that they were two sides of the same coin. They were forces of social control that together sought to safeguard the colony from its own population as well as manage the transition of New South Wales from a penal colony to a colony of free settlers. They were weapons in the colony's arsenal to combat crime, but were also complicit in more insidious forms of settler state building and colonial population control. The entangled histories of the Bushranging and Vagrancy Acts allow us to see the responsiveness of the law to the needs of government at the edge of empire, and the law's capacity to shape and safeguard a nascent settler state. These entangled histories also demonstrate that these legislative interventions came with a price. The Bushranging and Vagrancy Acts contained broad discretionary powers that suspended legal protections and impinged free colonists' liberty in order to achieve these ends.

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