Unequal Justice

Colonial Law and the Shooting of Jim Crow

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Abstract

Despite the extent of frontier violence in the Port Phillip District (as Victoria was called before it became a separate colony in 1851), deaths of Aboriginal people only proceeded to full murder trials on two occasions. The first, involving three Western District settlers accused of shooting dead three women and a child in February 1842 in what became known as the Muston's Creek massacre, is somewhat better known. The second, lesser-known trial concerned three policemen charged with murdering an Aboriginal man called Jim Crow, who they had been ordered to arrest, in the Wimmera area in October 1843. Although the shooting of Jim Crow has been mentioned by other authors, there has been no detailed discussion of the events.

This essay examines the case throughout, from the issuing of arrest warrants and policing practices to prosecution and presentation of evidence. It considers how the processes of Anglo-Australian colonial law skewed a supposedly impartial legal system to favour Europeans over Aboriginal inhabitants, despite their nominal equality as British subjects. It argues that in the frontier conflict over land, the application of colonial law supported settlers' interests and posed significant obstacles for Aboriginal complaints to be heard, particularly in evidence. In so doing, the law denied Aboriginal subjects substantive legal protection, exacerbating frontier violence.

The stand-off lasted for three-quarters of an hour. The suspect stood poised with a single spear ready to throw, and held spares in his other hand. Surrounding him on four sides were three mounted policemen and a settler, guns aimed at their quarry...

Border Police troopers James Daplin, William Sparrow and Frederick Bushe had been sent to arrest Jim Crow for allegedly threatening to kill a squatter and had tracked him to the open Wimmera plain in which they now stood. Jim Crow, regarded as an Aboriginal renegade by squatters on Western Victoria's Wimmera frontier in 1844, had made it clear he would defend himself. The settler in the party, Daniel Cameron, parleyed to persuade him to lay down his spears, to no avail. From time to time, the weapon shipped in Jim Crow's spear-thrower quivered as if he were about to discharge it. Cameron had once seen him hurl a spear 150 yards with accuracy and judged he could kill a man at ninety yards; the troopers were barely fifty yards away. They were not inclined to test his skill: when Sergeant Daplin twice ordered his men to charge, twice they refused.

Daplin would wait no longer. His party had less than three hours of daylight left in the October afternoon, and they were twenty-five miles by horse from the security of the nearest station, the nearest outpost of civilisation. Unable to effect a capture without endangering the life of man or horse, he ordered his men to fire. A single shot from Trooper Sparrow's carbine hit Jim Crow in the left breast. The ball passed through his body and out near his shoulder blade. Silently, without a cry, he dropped gently to his knees, then onto his arms, and slowly onto his side. He still held his spears in his hand. Soon after, he died. His body was left where it fell.[2]

The impasse on the Wimmera plain on Saturday 19 October 1844 was not simply one between black and white men but also between two forms of law, two views of justice. Just as policemen Daplin, Sparrow and Bushe acted according to their people's laws, so Jim Crow, if the accusations against him are to be believed, had acted according to the laws of his people[3] – by asserting ownership of land and threatening punishment for those who unjustly occupied it. Colonial land law allowed Aboriginal people to be expelled from their lands, prompting them to complain of 'uncalled for, unreasonable and oppressive treatment'.[4] Frontier conflict between European settlers and Indigenous inhabitants was generally a matter of disputed land use.

The shooting of Jim Crow, however, was a one-sided affair: not only at the level of manpower and firepower used or as an account rendered by his pursuers, but also in the surrounding legal process and the eventual trial of the three troopers for murder. The Jim Crow case affords an opportunity to explore some of these unequal workings of Anglo-Australian law in the frontier conflict of the 1840s in the Port Phillip District. I will examine aspects of colonial law in the order in which they enter the case – from the role of magistrates in issuing arrest warrants, through the policing of the frontier, to the operation of the criminal courts.

Prelude: Accusations, Magistrates and Warrants

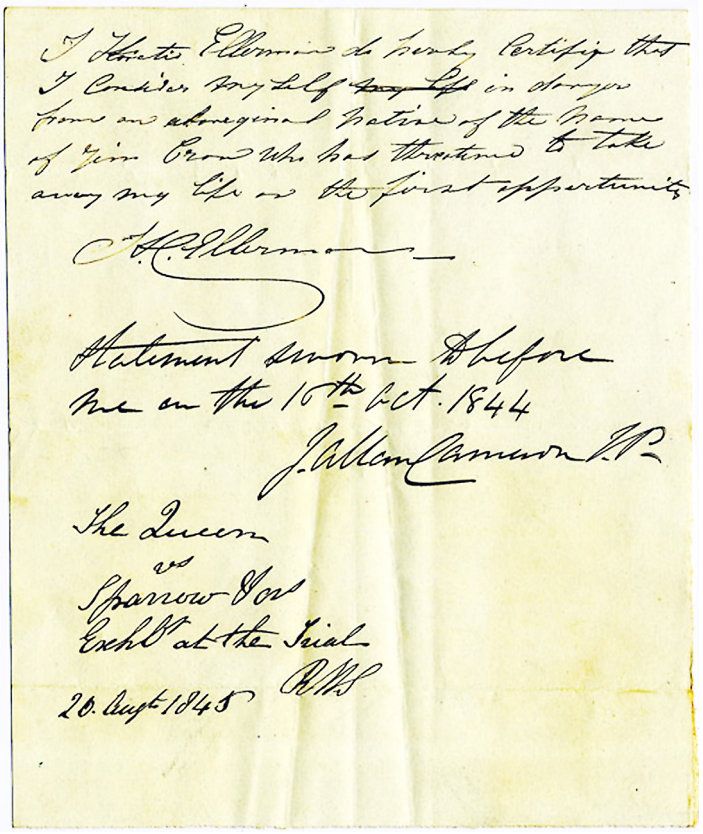
In the week before the stand-off, station overseer Daniel Cameron had fired off a volley of accusations against Jim Crow. A shepherd had been attacked by a group of Aboriginal men but not killed; a station worker's life had been verbally threatened; sheep had been stolen from the runs; the Aboriginal group were planning 'to murder all the settlers in this quarter and carry off all the stock belonging to them'.[5] Jim Crow, according to Cameron, was at the centre of it all. He was alleged to have given the command to spear the shepherd. He was accused of threatening to kill the station worker. He was said to have driven off the sheep.

Sergeant-Major Peter Bennett of the Native Police led a party of four troopers to investigate some of the claims circulating at stations on the Wimmera River, just north of the Grampians ranges. His Aboriginal troopers, known for their tracking skills, followed the tracks of the missing sheep and discovered they had merely joined another flock. He also found another report 'in a great measure to be false'.[6] A shepherd and hutkeeper reportedly speared at Ashens station, one of two stations where Cameron worked for squatters Dugald McPherson and William Taylor, had been untouched when 'four blacks had thrown some spears ... and tried to get some sheep away but did not succeed'.[7]

Cameron was unhappy with the Native Police officer's handling of the Jim Crow case: he felt that Bennett, whom he would later describe as a 'rank coward', had allowed the suspect to escape on another matter.[8] While Bennett was still investigating the accusations, Cameron urged Horatio Ellerman, the overseer whose life was allegedly threatened at the neighbouring Brighton station of Henry Darlot, to apply formally to an alternative legal authority for Jim Crow's capture. Ellerman rode about fifty miles east to the Pyrenees district to an honorary magistrate, James Allan Cameron (apparently no relation to his neighbour), who had control over a detachment of Border Police.[9] There, three days before the stand-off, he presented letters from Daniel Cameron outlining the accusations made to Bennett against Jim Crow. Ellerman also swore before the magistrate:

> I Horatio Ellerman do hereby Certify that I Consider myself in danger from an aboriginal native of the name of Jim Crow who has threatened to take away my life on the first opportunity.[10]

JA Cameron then issued an arrest warrant and ordered the Border Police party under Sergeant Daplin to capture Jim Crow. His alleged offence: using threatening language.


I Horatio Ellerman do hereby Certify that I Consider myself ~~in danger~~ in danger from an aboriginal Native of the Name of Jim Crow who has threatened to take away my Life on the first opportunity

H. Ellerman

Statement sworn before me on the 16th Oct. 1844

J. Allan Cameron J.P.

The Queen vs Sparrow & Ors Exhibit at the Trial

20 Augt 1845

PROV, VPRS 30/P0, unit 188, NCR 174, sworn statement of Horatio Ellerman.

Magistrates' responsibilities in mid-1840s Port Phillip extended beyond judicial duties to include the detection and prevention of crime through their control over police. They have been described as 'a combination of thief-catcher and judge'.[11] The separation of magisterial and police powers would not begin until well into the 1850s. As a magistrate near the frontier in 1844 and with a detachment of police at his disposal, JA Cameron was a key local representative of colonial law. His decisions could, in effect, determine who and what were policed and how.[12]

However, in matters of frontier conflict, JA Cameron's decisions were unlikely to be impartial. The Scottish former cavalry officer was himself a squatter, with a run named Decameron. His district's occasional court of petty sessions was held at the station of another settler, WH Pettitt, where during the previous twelve months Aboriginal attackers had speared a shepherd and taken sheep. Cameron had issued a warrant for Jim Crow's arrest over that spearing, too.[13] Like many colonial magistrates, Cameron was burdened with the conflict of interest brought about by his connection to settlers in their ongoing disputes with Aboriginal people over land. The appointment of magistrates in 1840s Port Phillip replicated that of the English magistracy of the seventeenth and eighteenth centuries, with justices chosen from their district's landholding class. This also replicated the failings of the English system: a local justice, responsible for both detection and punishment of crime, would almost inevitably hold prejudices that favoured the interests of the recognised landholders (settlers) over those of Aboriginal inhabitants.[14]

The ease with which Daniel Cameron's and Horatio Ellerman's word could initiate magisterial action and police pursuit of Jim Crow, and so enforcement of pastoralists' interests in the frontier conflict, highlights the inherent partiality of colonial law. In contrast, the Indigenous population, although theoretically equal before the law as Her Majesty's subjects, had no such ease of access to squatter-magistrates and police. By and large, they would have been ignorant of colonial law's processes for seeking the arrest of a suspected wrongdoer, and would almost certainly have been reliant on assistance from a friendly European. They would also have had to overcome suspicions of a legal system that treated them more often as accused than accusers. For these reasons, they generally took complaints to Port Phillip's Protectors of Aborigines, who held magisterial powers. Even then, however, any attempt to obtain a warrant faced the further impediment of the unacceptability of the complainant's oath: the same reasoning that prevented Aboriginal people from giving sworn witness testimony in court – that they did not believe in a supreme being[15] – also prohibited the sworn oath required for a warrant, as Horatio Ellerman had made. In this, the legal equality of Aboriginal subjects was considerably limited by practical realities, such as suspicion and lack of awareness, and by the cultural specificity of the law itself, such as its requirement for religious oaths.

The arrest warrant for Jim Crow was itself said to be irregular. In the court case the following year, Crown Prosecutor James Croke would insist that the warrant was issued by a magistrate 'who was not authorised so to act, not having sufficient grounds upon which to do so', and that as a consequence 'in law it was no warrant'.[16] Croke's argument, in part, concerned whether a summons should have been issued instead of an arrest warrant. However, as trial judge Richard Therry noted, what was the magistrate to do: issue a summons against 'a savage of the woods unable to read?'.[17] The judge's observation – that Aboriginal suspects had to be arrested rather than summonsed to ensure their attendance in court – reveals a further limit to equal application of colonial law: Aboriginal people had a different language, culture and unfixed abode. Further, issuing a warrant empowered troopers with the potential to resort to lethal – and legal – force not available when serving a summons. Croke noted in the trial that the troopers could legally fire only with 'a valid authority' (a warrant) or in self-defence. Therry also remarked that 'the law was, that a party being authorised to arrest, and the party resisted, the arrestor was authorised in opposing force to force'.[18] A white settler served with a summons for allegedly using threatening language would not be shot for noncompliance; an Aboriginal suspect such as Jim Crow, accused of the same minor offence and 'resisting a warrant the consequences of which [he] did not understand',[19] could be. Issuing arrest warrants for Aboriginal people was common practice.

Pursuit: Police and Policing

Two police forces pursued Jim Crow. The Border Police and Native Police – two of the five main police forces in Port Phillip District in the mid-1840s – operated on the frontier of settlement. Both were armed and mounted corps, their mobility making them well suited to policing rural areas. The Native Police (1837-8, 1838-9, 1842-53) were Aboriginal troopers under European officers. The Border Police (1839-46) were, until 1845, 'government men' – well-conducted convicts and former convicts, many of them former soldiers transported for military offences – which has raised doubts about their capability and honesty.

Unpaid and working only for rations, this relatively cheap force suggests something of the attitude of colonial authorities to frontier policing. They were controlled by the Commissioners of Crown Lands, who also had such bureaucratic duties as collecting licence fees, assessing land and stock for tax purposes, and settling boundary disputes. The two forces frequently operated under the orders of local magistrates. An important function of both was to minimise frontier violence, yet both on occasion ended up in bloody conflict with Aboriginal groups and individuals.[20]

William Strutt, Aboriginal troopers, Melbourne police, with English corporal, pencil and watercolour, 1850, in Victoria the Golden: scenes, sketches and jottings from nature, 1850–1862. Reproduced with the permission of the Parliamentary Library, Parliament of Victoria

In the hunt for Jim Crow, however, the two used dissimilar policing methods. At this time Sergeant Bennett of the Native Police had been specifically ordered to take a nonviolent approach in Aboriginal cases. He reported after Jim Crow's death:

> The party under my charge had not discharged a single shot, as having received my instructions not to use any coersive [sic] measures with the natives excepting in extreme danger.[21]

He had followed these instructions when he had tracked down the suspect about a week earlier. Jim Crow was wanted on an earlier warrant for allegedly stealing sugar; Bennett had found his people's camp but he was not there. When Bennett returned later and Jim Crow fled, the policeman chose not to risk confrontation with a chase.[22] This nonviolent and discretionary policing, under instructions from superiors remote from the frontier, contrasts markedly with Daplin's strict pursuit of an arrest, and willingness to use violence with fatal results, under orders from a local magistrate. However, Bennett's failure to arrest infuriated settlers such as Daniel Cameron, leading to the approach to the magistrate and ultimately to the fatal Border Police pursuit.[23]

With few men and wide territory to police, troopers were frequently 'one move behind the play' in frontier conflict.[24] The Border Police's Western Port detachment, which also covered the Wimmera, comprised barely a dozen men at the end of 1844 to patrol many thousands of square kilometres.[25] In searching for Jim Crow, Daplin and his men were almost a day behind a European party in pursuit of the suspect's group. They overtook the settlers at a campsite that they shared with Bennett's Native Police. Daplin's patrol was joined by Daniel Cameron to provide local knowledge and identify Jim Crow should they find him.[26] This joint hunt with settlers suggests police partiality and conflict of interest, similar to that of the magistrates, brought about by their relations with settlers.[27] It also suggests an alliance for mutual benefit, if not shared aims. For the troopers, civilians augmented their manpower and intelligence on likely Aboriginal numbers, locations and movements. It also put them in effective command of what might otherwise have been a punitive expedition by squatters, and so helped to fulfil their aim of minimising frontier conflict. For the settlers, troopers increased numbers, firepower and the chances of reducing, by arrest or death, Aboriginal opposition to white settlement. Police command also gave their party the legitimacy of a state agency: any collision would have a degree of official sanction.

From an Aboriginal perspective, however, the police were not a welcome body defending their interests. The appearance of troopers working alongside settlers would have affirmed the view that police were not impartial and that troopers and civilians were merely different aspects of the same European invasion and threat. Jim Crow voiced such an opinion of settlers and police as united opponents when they caught up with him on the Wimmera plain, twenty-fives miles north of McPherson's and Taylor's Longernong station, telling the troopers to go or he 'would kill them all and all the white settlers'.[28]

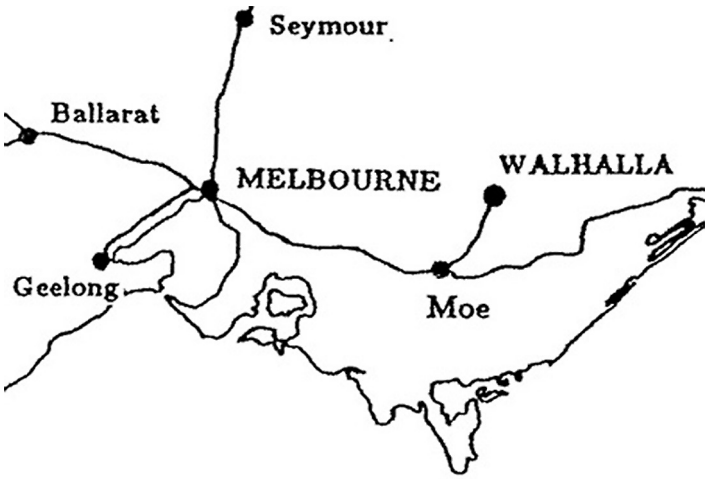
An incident on the day of the stand-off would have reinforced that belief. As they searched for Jim Crow, Daplin's party had encountered a camp in thick scrub. It was almost certainly Jim Crow's people. The pursuers separated and approached from different directions, in a military-style pincer movement. As they moved in, 'the spears flew in all directions' and Daplin and Sparrow returned fire, killing an Aboriginal man named Charlie.[29]

The troopers' intentions may have been hostile, precautionary or entirely peaceful, although it was well known on the frontier that to approach an Aboriginal camp in such a fashion would incite violence.

> Now it cannot be denied that even, if a peaceable Tribe is surprised that Blacks seize their spears ... Major Mitchell and every other writer have cautioned parties against hastily making a native Encampment ... a body of Mounted Men Galloping into an Encampment, however peaceable they may have been before, is enough of itself to excite them ...[30]

Those camped in the scrub certainly interpreted the troopers' actions as a threat. The fatal outcome no doubt confirmed their interpretation and their view of police hostility and partiality.

The hunt for Jim Crow illustrates some of the impossibilities of equitable frontier policing using available models. The Native Police's nonviolent approach at this time to Aboriginal relations, comparable with the civil policing philosophy of London's constabulary, angered settlers and led indirectly to the hunt by Daplin's troopers. The Border Police's militaristic approach was supported by the settlers but caused Aboriginal fatalities. Like the paramilitary Irish Constabulary on which both forces were modelled, the Border Police enforced a law to the benefit of recognised landed interests. Indeed, the corps was an arm of the Commissioners of Crown Lands, whose name acknowledged land ownership residing in a single sovereignty and implied denial of Indigenous law and land ownership.[31] Nonviolent and militaristic policing alienated either European or Aboriginal inhabitants along the Wimmera frontier, and neither method prevented violence or protected Indigenous subjects.



This map shows Brighton run and Ashens run, two of the stations mentioned in the article. PROV, VPRS 6760/P0, Unit 1, Item 5, Robert Brough Smythe.

Prosecution: Indictments, Courts and Juries

In an attempt to stop frontier violence, Governor George Gipps in Sydney, under instructions from London, had ordered that inquiries be held into all cases of Aboriginal deaths from collisions with Europeans. The Commissioners of Crown Lands and their Border Police had long-standing instructions to take witness depositions for such inquiries and for any prosecution that might follow.[32] In the Jim Crow case, with police involved in the death, the task of collecting depositions fell to magistrate JA Cameron, who had issued the arrest warrant. These he forwarded to the head of government in Port Phillip, Superintendent Charles La Trobe, reaching Melbourne about a fortnight after the shooting. The Chief Protector of Aborigines, George Augustus Robinson, learned of events before La Trobe could inform him. Details were later forwarded to the Crown Prosecutor.[33]

The success of this system of official scrutiny and legal intervention as a means for protecting Aboriginal lives depended on the success of prosecution and sentencing as a deterrent to future frontier violence. However, the system was not without its faults. The Border Police repeatedly failed to take depositions following collisions, and were later upbraided for their laxity.[34] In the Jim Crow case, the act of a magistrate both ordering an arrest and interviewing those involved in the subsequent deaths demonstrates a conflict between the unseparated frontier powers of police and judiciary. JA Cameron, in his letter to La Trobe accompanying the statements, even went so far as to opine that the police were 'obliged in self-defence to shoot two of the Natives'. Significantly, Aboriginal witnesses could not supply statements under oath, so their version of events was excluded from the depositions and the legal process. Instead, representation of Aboriginal legal interests was dependent on sympathetic European intermediaries such as the Protectors of Aborigines. Indeed, the existence and function of the Protectors acknowledged implicitly that the theoretical equality of Aboriginal subjects was not matched by the realities of practice.

After eight months, word of the shooting became public in Melbourne. Press reaction revealed staunch support for settlers on the frontier, hostility to the Aboriginal inhabitants and an assumption of innocence or justification on the part of the police. The Indigenous people of the Wimmera were regarded as 'excessively troublesome customers' and when police were sent in 'encounters naturally followed'.[35] The Protectors received particular criticism for representing Aboriginal interests.

> It is certainly very singular how indefatigable the Protectors generally are in cases against the natives, and how negligent and fair and easy they show themselves when a Koort Kirrup or any other sable murderer happens to be arraigned before a British tribunal.[36]

The 'sable murderer' Koort Kirrup, who denied the allegation that he had killed two Western District settlers, was presumed guilty before he was tried.[37] Policemen who shot dead two Aboriginal men were afforded a greater presumption of innocence.

The policemen appeared before the Supreme Court in Melbourne on Wednesday 20 August 1845 – Sparrow, who fired the fatal shot, on a charge of murdering Jim Crow, Daplin and Bushe for 'counselling, aiding, assisting and abetting' in the alleged murder. The main issues considered were the legality of police actions when executing an invalid warrant and whether the threat posed by Jim Crow justified shooting him in self-defence.

In determining this the court relied overwhelmingly on the testimony of Daniel Cameron, whose initial claims of Jim Crow's depredations had been cast into doubt, who had been central to instigating the police pursuit and who had participated in the hunt and fatal stand-off. He was far from an impartial witness. The only other witness called was magistrate JA Cameron, who gave evidence about his issuing of the warrant. The law forbade sworn evidence from Aboriginal witnesses such as Jacky Jacky, one of those in the camp where 'the spears flew in all directions' and where the man named Charlie was killed. After the camp skirmish, Daniel Cameron had induced Jacky Jacky to help the police party find Jim Crow and, according to Cameron's evidence, 'the guide' was present during the fatal stand-off.[38] Yet Jacky Jacky, a witness to both shootings, gave neither deposition nor courtroom testimony. He might have confirmed or contested Cameron's account and elaborated on his euphemistic three-word courtroom description of the fatal scrub skirmish – 'the camp dispersed'.[39]

Other courtroom discussion considered the place of the Indigenous population as theoretically equal subjects under Anglo-Australian law. In his opening address to the jury, prosecutor James Croke said 'the aboriginals were as much entitled to protection as any other portion of her Majesty's subjects, and that the homicide of an aboriginal must be prosecuted the same as the homicide of any other person'. However, Judge Therry noted:

> In the application of the British law to the aborigines, there was a great difficulty ... in consequence of the discrepancies in the habits and manners of the savage man compared with those in civilized life. Although they were entitled to the same law as ourselves they were not to be encouraged by any false notions, or by any undue regard or facility, any more than ourselves, and if one of the jury had been placed in the position of the black, and under the circumstances if the policemen were justified in shooting him, they were equally justified in shooting the black.

Therry's argument of a situation analogous with a white suspect sought by police assumes an equal understanding of the workings of colonial law and of the legal processes following surrender. However, the standing counsel for the Aborigines, Redmond Barry, argued that the troopers had not told Jim Crow what they required of him. Nonetheless, the judge's opinion to the jury was that 'as much notice had been given to a person of that kind as could be given', and that if the police had not given actual notification 'there was at least an implied notification, and that was sufficient'.

John Botterill, Portrait of Sir Redmond Barry, K.C.M.G. [picture], c. 1853 – c. 1880, painting: oil on canvas. La Trobe Picture Collection, State Library of Victoria.

Therry's argument also indicated that Aboriginal subjects of the Crown were entitled to the protection of British law and had to comply with British law. This suggested that Jim Crow and other Aboriginal people understood and accepted the implicit social contract between state and subject which afforded protection in exchange for submission to the law.

Jim Crow's actions, however, suggest the contrary: he did not regard himself as part of the encroaching white society that he resisted, threatening to kill 'all the white settlers', and he did not feel himself bound by its laws or legal agents. Ultimately, he did not get its protection either. He was in effect a subject in name only, by foreign dictate, conferred without his consent through the Crown's claim of sovereignty over the lands of his people and others.

The individual beliefs and opinions of the jury members were randomised by alphabetical selection, but collectively they were white men who satisfied the property qualification for jury duty. Of the twelve jurors named in press reports of the trial, two were farmers but most were small businessmen and/or skilled tradesmen, with occupations ranging from publican and grocer to builder, upholsterer and glazier.[40] Most lived in Melbourne, but the ten-year-old town was not far removed in time from frontier settlement. As a group, they were likely to represent a similar social class to the Wimmera settlers, with perhaps similar perspectives. Also, press coverage of the impending case had promoted assumptions of police innocence and Aboriginal depredation and violence,[41] which may have reflected or informed public opinion about frontier conflict. Overall, the jurors might well have been expected to sympathise with policemen who acted in defence of settlers' interests.

Their verdict was swift. Without retiring, they acquitted the three defendants of murdering Jim Crow.[42] The prosecution then dropped charges relating to the killing of Charlie. The court never explored the dispersal of the camp where Charlie died.

Jim Crow's death was one of only two cases in Port Phillip in the 1840s in which whites faced a complete murder trial over Aboriginal deaths. The Muston's Creek massacre produced the other trial – and that through the inducement of a hefty reward of £100, or for convicts a pardon and passage to England, for Queen's evidence from 'any parties who were not principals in the first degree, or did not actually fire the shots causing death'.[43] The difficulty of securing admissible evidence, when so often the only non-Aboriginal witnesses to killings were the alleged offenders and their colleagues, had previously led to abandoned prosecutions and lesser charges, if charges could be laid at all. In 1837 the murder trial of convict shepherd John Whitehead, accused of shooting an Indigenous man tied to a tree on a station near Geelong, collapsed as it opened because the witnesses (and possible accomplices) had fled to Van Diemen's Land.[44] In 1839 murder charges against shepherds John Davis and Abraham Braybrook were dropped for insufficient evidence that they had shot two Aboriginal men near Mount Mitchell, although they were prosecuted for 'the misdemeanour of burning the bodies before any legal investigation took place'.[45] In 1841 squatter George Bolden was acquitted of shooting with intent to kill an Indigenous man on his Western District property; the murder charge on which he had been committed, based on information from an Aboriginal witness, was dropped before trial.[46]

No Europeans in Port Phillip were found guilty of murdering Aboriginal people in this period. According to Robinson, Chief Protector of Aborigines, not until 1847 was a settler convicted for violence against an Indigenous person, receiving a bare two-month jail sentence for the shooting. In the same period, five Aboriginal men were hanged and four transported, two of them for life, for attacks on Europeans.[47]

The acquittal of Daplin, Sparrow and Bushe in what he called a farce of a trial[48] prompted Robinson to report (not for the first time, and not for the last) on the human cost of forbidding Aboriginal testimony and of the 'unequal justice' that Aboriginal people had complained of. Settlers knew that the law's rejection of Aboriginal evidence allowed them, quite literally, to get away with murder. He wrote that 'there is reason to fear numbers of natives have been shot and others poisoned by the wicked disposed of the whites from the known fact of the natives being incapacitated to give evidence'.[49] Months earlier a squatter in the Wimmera had told him that settlers there opposed legalising Aboriginal testimony 'because so many are implicated in killing Natives'.[50] Legislation to accept Aboriginal evidence, Robinson now wrote, was 'not only requisite as a measure of justice but essentially necessary for the preservation of a race'.[51] In the year Jim Crow died, however, the squatter-dominated New South Wales legislature had rejected just such a bill, fearful of a repeat of the hangings of whites convicted over the 1838 Myall Creek massacre.[52] Similar bills also failed to win London's or Sydney's approval in 1839 and 1849.[53]

Conclusion

The Jim Crow case demonstrates a pervasive inequity in colonial law in 1840s Port Phillip. For European settlers, the rule of law worked in their favour. They could seek protection of life and property through the magistracy and/or frontier police forces. If one did not satisfactorily meet their needs, another might. The agencies of the law helped to reinforce their occupation of land and legitimise their claim to it. The military style of frontier policing was not directed against them. Prosecutions of settlers for offences against Aboriginal inhabitants were few indeed, and convictions rarer still.

The rule of law, however, gave little protection and few practical rights to the Indigenous population. Nonviolent, discretionary policing could be nullified by settlers' superior legal access to squatter-magistrates and police. Aboriginal people might be subject to force under warrant, whereas others might be served with a summons. As complainants, they were reliant for practical reasons on European intermediaries. As witnesses, their evidence for culturally determined legal reasons was unacceptable. Instead, accounts from Europeans dominated the legal process, with judgement delivered by those likely to sympathise with settlers and feel adversely towards them. That two types of policing were employed in the hunt for Jim Crow illustrates that frontier police were not singularly or always hostile to Aboriginal people. That those who shot Jim Crow were prosecuted reminds us that the operation of colonial law was not uniformly and monolithically contrary to the protection of Aboriginal people and their interests. However, at each procedural stage, simple prejudice or systemic partiality operated. At each stage, Aboriginal subjects were denied in practice the full legal equality that they held in theory.

The ramifications of colonial criminal law for Indigenous people were felt most intensely outside the courtroom and in such places as the Wimmera plains. Acceptance of Aboriginal evidence was not simply a matter of legal process but of protection of human life. The imperial claim that Aboriginal people were subjects was expressed less by a prosecutor's avowal of equal protection than by the demand in police practice that they submit to rules they did not understand or consent to.

Endnotes

[1] Jim Crow's shooting has been discussed in J O'Sullivan, *Mounted police of Victoria and Tasmania*, Adelaide, Rigby, 1980, pp. 32-3; ID Clark, *Aboriginal languages and clans: an historical atlas of Western and Central Victoria, 1800-1900*, Department of Geography and Environmental Science, Monash University, 1990, pp. 241, 244; ID Clark, *Scars in the landscape: a register of massacre sites in Western Victoria, 1803-1859*, Aboriginal Studies Press, Canberra, 1995), p. 163; and, with a brief summary of the trial, in M Cannon, *Who killed the Koories?*, William Heinemann Australia, Port Melbourne, 1990, pp. 148-50.

[2] Description of event taken from James Daplin, statement No. 3, 24 October 1844, PROV, VPRS 30/P, Unit 188, NCR 174; *Port Phillip Patriot*, 21 August 1845; and *Port Phillip Herald*, 21 August 1845. The shooting occurred in the region of present-day Warracknabeal, Western Victoria, although the precise location is unknown. I use the more common spellings of Jim Crow, Daplin and Bushe rather than the variants Jem Crow, Duplin and Bush.

[3] Jim Crow was most probably from one of the eastern Jardwadjali clans, judging from the location of the alleged offences. However, he was also accused of depredations in the Pyrenees region in Djadja wurrung country, and his shooting may have been in neighbouring Wergaia country. As there may therefore be some small doubt as to which country and which group he belonged to, I have referred to him nonspecifically as Aboriginal. Clark, however, identifies Jim Crow as coming from a Jardwadjali clan and dying in Jardwadjali country: see ID Clark, *Aboriginal languages and clans*, pp. 241, 244 and *Scars in the landscape*, p. 163.

[4] George Augustus Robinson, Chief Protector of Aborigines, 1845 Annual Report, PROV, VPRS 4399, Unit 1 (microfilm copy VPRS 4467, reel 3).

[5] Daniel Cameron, statements No. 1 and 2, PROV, VPRS 30/P, Unit 188, NCR 174.

[6] Peter Roberts Bennett, statement, PROV, VPRS 30/P, Unit 188, NCR 174.

[7] ibid.

[8] D Cameron, statement No. 1; ID Clark (ed), *The journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate*, vol. 4, *1 January 1844 – 24 October 1845*, 2nd edn, Heritage Matters, Melbourne, 2000, p. 245 (4 April 1845).

[9] J Allan Cameron to CJ La Trobe, 24 October 1844, PROV, VPRS 30/P, Unit 188, NCR 174; Bennett, statement, op. cit.

[10] J Horatio Ellerman, sworn statement, 16 October 1844, PROV, VPRS 30/P, Unit 188, NCR 174.

[11] D Palmer, 'Magistrates, police and power in Port Phillip', in *A nation of rogues? Crime, law and punishment in colonial Australia*, ed. D Philips & S Davies, Melbourne University Press, 1994, p. 94.

[12] ibid., pp. 78, 94.

[13] Robinson, *Journals*, vol. 4, p. 243 (31 March 1845); JJ Mouritz, *The Port Phillip almanac and directory for 1847*, Melbourne, W Clarke, 1847, pp. 33, 68, 125; Separation Association, *The Port Phillip Separation merchants' and settlers' almanac, diary and directory for Melbourne and the District of Port Phillip [for] 1846*, W Clarke, Melbourne, 1845, pp. 113, 126; Edward Parker, Assistant Protector of Aborigines, letter, 1 December 1843, PROV, VPRS 11, Unit 5, File 210 (microfilm copy VPRS 4467, reel 1); J Allan Cameron, letter, 24 October 1844.

[14] M Finnane, *Police and government: histories of policing in Australia*, Melbourne University Press, 1994, pp. 25-6; D Hay, 'Property, authority and the criminal law', in *Albion's fatal tree: crime and society in eighteenth-century England*, ed. D Hay et al., Allen Lane, London, 1975, pp. 34-5, 38-9.

[15] B Kercher, *An unruly child: a history of law in Australia*, Allen & Unwin, St Leonards, New South Wales, 1995, pp. 15-17.

[16] *Port Phillip Patriot*, 21 August 1845.

[17] ibid.

[18] ibid.

[19] GA Robinson, Chief Protector of Aborigines, 1844 Annual Report, PROV, VPRS 19/P, Unit 68, File 45/249.

[20] O'Sullivan, *Mounted police of Victoria and Tasmania*, pp. 22-6, 36-7; R Haldane, *The people's force: a history of the Victoria Police*, Melbourne University Press, 1986, pp. 5, 12, 16-17; Palmer, 'Magistrates, police and power in Port Phillip', pp. 88-90; M H Fels, *Good men and true: the Aboriginal Police of the Port Phillip District 1837-1853*, Melbourne University Press, 1988, pp. 3, 111-14, 155; M Sturma, 'Policing the criminal frontier in mid-nineteenth century Australia, Britain and America', in *Policing in Australia: historical perspectives*, ed. M Finnane, University of New South Wales Press, Sydney, 1987, pp. 23-6.

[21] Bennett, statement, op. cit.

[22] ibid.

[23] D Cameron, statement No. 1, op. cit.

[24] Fels, *Good men and true*, p. 156.

[25] CJ La Trobe to FA Powlett, 26 March 1845, PROV, VPRS 6909, Unit 1, File 45/355.

[26] Daplin, statement No. 3, op. cit.

[27] Finnane, *Police and government*, p. 26.

[28] *Port Phillip Patriot*, 21 August 1845.

[29] Daplin, statement No. 3, op. cit.

[30] William Thomas, Assistant Protector of Aborigines, 1 December 1843, journal of proceedings, PROV, VPRS 4410, Unit 3, File 78 (microfilm copy VPRS 4467, reel 2).

[31] Finnane, *Police and government*, pp. 11-13; J McQuilton, 'Police in rural Victoria: a regional example', in *Policing in Australia*, pp. 36-7; Palmer, 'Magistrates, police and power in Port Phillip', p. 75.

[32] *New South Wales Government Gazette*, 22 May 1839, p. 606; Colonial Secretary, circular, 7 November 1846, PROV, VPRS 6909/P/1, Unit 1, unnumbered item.

[33] J Allan Cameron, letter, 24 October 1844; Robinson, *Journals*, vol. 4, pp. 222-3 (4 and 5 November 1844).

[34] Colonial Secretary, circular, 7 November 1846.

[35] 'Alleged murder of Aborigines', *Port Phillip Herald*, 5 June 1845.

[36] ibid.

[37] After many court appearances over almost fifteen months, Koort Kirrup was discharged without trial in March 1846 on the grounds that he was unable to comprehend the court process. See *Port Phillip Herald*, 17 March 1846.

[38] Cameron, undated statement, PROV, VPRS 30/P, Unit 188, NCR 174; *Port Phillip Herald*, 21 August 1845; *Port Phillip Patriot*, 21 August 1845.

[39] *Port Phillip Patriot*, 21 August 1845. Further quotations from the court proceedings are also taken from this source. For a discussion of the violence surrounding 'dispersing a camp' see PROV, online exhibition *Tracking the Native Police*, Image 19 http://www.prov.vic.gov.au/nativepolice/westerndist_methods.html, accessed 24 September 2006.

[40] Mouritz, *Port Phillip almanac and directory for 1847*, pp. 132-8; Separation Association, *The Port Phillip Separation merchants' and settlers' almanac, diary and Melbourne directory for 1845*, W Clarke, Melbourne, 1844, pp. 75-6.

[41] 'Alleged murder of Aborigines', *Port Phillip Herald*, 5 June 1845.

[42] *Port Phillip Patriot*, 21 August 1845; *Port Phillip Herald*, 21 August 1845.

[43] CJ LaTrobe to Colonial Secretary, 3 September 1842, PROV, VPRS 32, Unit 1, File 42/1189. The Muston's Creek massacre and subsequent trial have been dealt with in some detail in I MacFarlane, *1842: the public executions at Melbourne*, Victorian Government Printing Office, Melbourne, 1984, pp. 43-6 and in S Davies, 'Aborigines, murder and the criminal law in early Port Phillip, 1841-1851', *Historical studies*, vol. 22, April 1987, pp. 313-35, esp. 320-5. The Muston's Creek trial brief can be found at PROV, VPRS 30/P, Unit 186, NCR 81.

[44] William Lonsdale to Attorney-General, 25 November 1836 and 29 January 1837, PROV, VPRS 1, Unit 1 (microfilm copy VPRS 2140, reel 1). Witness depositions from Frederick Taylor, James Flitt and Edward Freeston appear in the Melbourne Court criminal record book on 25 October, 3 November and 19 December 1836: PROV, VPRS 2136, reel 1.

[45] Lonsdale to Attorney-General, 2 July 1839, PROV, VPRS 1, Unit 1 (microfilm copy VPRS 2140, reel 1).

[46] *Port Phillip Gazette*, 4 December 1841.

[47] Robinson, 1847 Annual Report, in *The Papers of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate*, vol. 4, ed. ID Clark, Heritage Matters, Ballarat, 2001, p. 128. Robinson gave the gallows tally as 'three aboriginal natives of "Victoria"', which did not include the hangings of Tasmanians Bob and Jack in 1842. Cf. Supreme Court Criminal Record Book, 20 December 1841, 19 July 1842 and 25 February 1845, PROV, VPRS 78, Unit 1 (microfilm copy VPRS 5136).

[48] Robinson, *Journals*, vol. 4, p. 297 (20 August 1845).

[49] 1845 Annual Report, op. cit.

[50] Robinson, *Journals*, vol. 4, p. 248 (5 April 1845).

[51] 1845 Annual Report.

[52] In November 1838, eleven men were tried for murder over the killing of twenty-eight Aboriginal people at Myall Creek, New South Wales. All were acquitted, but seven were then controversially tried again and convicted on indictments not brought in the first trial. Their hanging caused an uproar among the settlers. For an interesting contemporary account, see George Gipps, December 1838, British Parliamentary Papers 1839, cited in H Reynolds, *Dispossession: black Australians and white invaders*, Allen & Unwin, Sydney, 1989, pp. 190–1.

[53] Kercher, *An unruly child*, pp. 16-17; AC Castles, *An Australian legal history*, The Law Book Company, Sydney, 1982, p. 534.