

From Pluralism to Territorial Sovereignty: The 1816 Trial of Mow-watty in the Superior Court of New South Wales

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In this paper we examine the trial of Mow-watty: the first Indigenous person to be sentenced to death by a Superior Court in Australia. By reviewing the Mow-watty trial, and the efforts of Governor Lachlan Macquarie to bring order and law to New South Wales' frontiers in 1816, we argue that it is possible to trace the remnants of an older understanding of sovereignty in empire and the rudiments of a new "territoriality" in the Colony of New South Wales.¹

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1 Term borrowed from C.S. Maier, "Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era" *American Historical Review* 105.3 (2000), at 807-831.

I INTRODUCTION

In September of 1816, the Sydney Gazette reported a remarkable event in the history of New South Wales: the trial, conviction and execution of an Aboriginal man named Daniel Mow-watty for the rape of a fifteen-year-old settler girl in “the vicinity of Parramatta.”² Mow-watty was somewhat of a celebrity, having been “adopted” by Richard Partridge as an infant and taken to London by botanist George Caley in 1805.³ He is known as the first Aborigine to be executed in the colony,⁴ a dubious distinction as the colonial government had mounted at least seven wars or retaliatory expeditions against Indigenous people between 1788 and 1816.⁵ However, Mow-watty was much more than a cultural curiosity in life and death. He was also the first Indigenous person to be tried by a Superior Court in New South Wales.⁶ His trial constitutes a juridical landmark: the beginning of a new era of legal process that both eroded and recognized Indigenous legal independence in the first decades of colonization.

In this paper, we argue that *R. v. Mow-watty* and 1816, the year of his trial, constitute a watershed moment in the jurisdictional practice of the colony. As the first trial of an Aborigine for a crime against settlers, *Mow-watty* illustrates a new drive by the Governor and the courts to redefine British authority in the colony by controlling settler-Indigenous conflict. Moreover, in 1816, Mow-watty’s case was the most important of a series of imperfect

2 *R. v. Mow-watty*, *Sydney Gazette*, 28 September 1816. We transcribed and placed the record online at *Decisions of the Superior Courts of New South Wales, 1788–1899*, Macquarie University, <<http://www.law.mq.edu.au/scnsw>>. The *Sydney Gazette* calls him “Mow-watty”, but he was also known as Daniel Moowattin.

3 Richard Partridge alias “Rice” came to Australia as a convict of the First Fleet. When he arrived in NSW he assumed the position of “the colony’s notorious hangman” and the nickname “the left handed flogger”. See K.V. Smith, “Moowattin, Daniel (c. 1791–1816)” *Australian Dictionary of Biography, Supplementary Volume* (Melbourne: Melbourne University Press, 2005) 286-287; Elaine Sheehan, “The Identity of Richard Rice: The Left Handed Flogger” (1984) 70(2) *JRAHS*. George Caley was a well-known naturalist who had worked with Sir Joseph Banks. On George Caley see: George Caley, *Reflections on the Colony of New South Wales*, ed. by J. Currey (Melbourne: Lansdowne Press, 1966).

4 See Keith Vincent Smith, *supra* note 3 at 286-287; Lachlan Macquarie diary A773, 1 November 1816, at 295 (State Library of New South Wales).

5 See John Connor, *The Australian Frontier Wars, 1788-1838* (Sydney: UNSW Press, 2005).

6 It is the earliest record we have found to date in our work: Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in Georgia and New South Wales 1788-1836*, (Cambridge, Mass: Harvard University Press, forthcoming); Bruce Kercher and Brent Salter, *The Kercher Reports: Decisions of the NSW Superior Courts, 1788-1827* (Sydney: Forbes Society [forthcoming in 2008]). The *Sydney Gazette* reference is the most detailed account of the trial we have found to date. No evidence of this case exists in the NSW State Records Superior Court archives. The reason for this is because the trial was held in a “gap” period after the death of Judge Advocate Ellis Bent (10 November 1815) and just before the arrival of Judge Advocate Wyld (October 1816). Acting Judge Advocate Fredrick Garling was the Chief Judicial Officer of the colony between November 1815 and October 1816.

attempts by the New South Wales executive government to redefine British jurisdiction in the colony, both in the centres of settlement and in its increasingly violent peripheries. All were imperfect because they followed a paradigm of Indigenous legal independence established hundreds of years before in the first Anglophone settler colonies. Placing the trial of Mow-watty in the context of subtle shifts in the legal relationships between settlers and Indigenous people in 1816, we argue that the case is a significant source in early New South Wales' history that illustrates the discursive limits of British sovereignty in the colony at a time of intense legal change.

Mow-watty's may have been the first trial of an Aborigine for any crime to be held before the Court of Criminal Jurisdiction in New South Wales, but the case constitutes an incomplete legal revolution. The *Sydney Gazette* transcript reveals that Mow-watty was not tried because British settlers claimed and exercised territorial jurisdiction over every person living in the broad expanse of the British colony of New South Wales. He was tried because of his peculiar proximity to the new colonial state—his intimacy, geographical, cultural and sexual, brought him within the purview of British law. As such, Mow-watty's case placed in its historical context epitomizes two lost eras in New South Wales history: pervasive legal pluralism in the first decades of colonization and its slow passing under the influence of a new breed of legally trained men, grappling towards new ideas about sovereignty and jurisdiction in the waning years of Governor Macquarie's regime.

II THE CRIMES OF DANIEL MOW-WATTY

Hannah Russell, the daughter of an emancipated convict, testified that Mow-watty attacked her as she walked alone on a country road leading out of the colony's second largest settlement, Parramatta. She alleged that he raped her, robbed her and beat her repeatedly in the vicinity of "Mr McArthur's [or Macarthur's] farm."⁷ Russell testified that another Aborigine urged Mow-watty to kill her, but he was not tried by the Court. Mow-watty fled only when Macarthur's stockman passed by. The stockman carried the girl to

7 We presume that Russell refers here to John Macarthur who introduced merino sheep to the colony and was one of largest landholders in the colony by 1816. The spelling of his name changed from "McArthur" to "Macarthur" sometime in the first two decades of the nineteenth century: see J. Currey, *The Brothers Bent* (Sydney: Sydney University Press, 1968) at 10. In 1816, Macarthur was in England defending his role in the overthrow of Governor Bligh in 1808. The property where Russell was allegedly raped was probably John Macarthur's first grant of land (100 acres granted by Lieutenant Governor Francis Grose in 1793: Grose to Dundas, 16 February 1793, *HRA* 1:1, at 416). Macarthur is the subject of substantial commentary see, for e.g., Michael Duffy, *Man of Honour: John Macarthur: Duelist, Rebel, Founding Father* (Sydney: Pan Macmillan, 2003); H.V. Evatt, *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps, including the John Murtagh Macrossan Memorial Lectures Delivered at the University of Queensland, June 1937* (Sydney: Angus and Robertson, 1943).

Macarthur's farm and when she was sufficiently recovered, sent her to walk home with a male workman, shaken, but apparently without serious physical injury.

Juridical moments like these were fraught. Prosecutrix and defendant were both suspect before the court. The prosecutrix could not give evidence of a crime against her virtue without corroboration because as a woman she was assumed to be morally and physically frail. In 1816, Hannah had to rebut her assumed moral frailty by asserting that she "used every effort to resist the ill treatment she received."⁸ According to her own testimony, she did not just rely on her feeble female body, she "cried for help as well as she was able, but all was unavailing."⁹ Her testimony was duly corroborated by the stockman, who swore that he heard cries that sounded like an animal coming from the vicinity of the crime.

For his part, Mow-watty was suspect in different, and for our purposes much more important, ways. First, Mow-watty was marked by his colour and his culture as a potential rapist of white women. An array of centuries-old cultural "knowledge" about Orientals and savages from the Middle East to Hawaii assumed that non-Europeans were lascivious and envious of white male access to white female bodies.¹⁰ Mow-watty was further marked as an Australian Aborigine because flawed settler-observations of the struggles of southeastern Indigenous people to form and maintain exogenous sexual relationships led settlers to assume that rape was natural and lawful in Aboriginal society.¹¹

8 *R. v. Mow-watty*, *supra* note 2.

9 *Ibid.*

10 Victoria Haskins and John Maynard, "Sex, Race and Power: Aboriginal Men and White Women in Australian History," 36:126 (2005) *Australian Historical Studies*, at 191-216; Pamela Scully, "Rape, Race and Colonial Culture: The Sexual Politics of Identity in the Nineteenth-Century Cape Colony, South Africa," (1995) *American Historical Review* 100:2 at 335-359; Nancy L. Paxton, *Writing Under the Raj: Gender, Race, and Rape in the British Colonial Imagination, 1830-1947* (Newark: Rutgers University Press, 1999); Edward Said, *Orientalism*, 1st ed (New York: Vintage Books, 1978) at 6, 21-22, 118-119; David Walker, *Anxious Nation: Australia and the Rise of Asia, 1850-1939* (St Lucia: University of Queensland Press, 1999).

11 See David Collins, *An Account of the English Colony of New South Wales, with Remarks on the Dispositions, Customs, Manners, etc. of the Native Inhabitants of that Country*, 2 volumes [1798, 1802], ed. by Brian Fletcher (Sydney: Reed, in association with the Royal Historical Society, 1975 ed): vol. 2, at 47, vol. 1, at 488. For a much later primary source account of the customary nature of rape in Aboriginal society, see *Sydney Herald*, February 16, 1835, reproduced in *Decisions of the Superior Courts of New South Wales*, online: Macquarie University <<http://www.law.mq.edu.au/scnsw/>>. Alfred Howitt, *Native Tribes of South-East Australia* [1905], (Canberra, Aboriginal Studies Press, 1996) at 334-347; see Les Hiatt, *Arguments about Aborigines* (Cambridge: Cambridge University Press, 1996), Chapter 5. For a more detailed discussion and primary accounts, at 85-99; Inga Clendinnen, *Dancing with Strangers: Europeans and Australians at First Contact* (Cambridge and New York: Cambridge University Press, 2005) at 18-36, 57-81, 96.

Mow-watty was also suspect in other ways. His colour and nakedness made him anonymous in a way that rendered his status before the court unstable.¹² The prosecutrix made no claim to recognize his face, but identified him by markings on his arms.¹³ Moreover, his Aboriginality made him mute before the court. He could not defend himself by giving evidence, so according to common law rules of procedure he ought not to have been tried at all.¹⁴ Indeed, the first trial of Aborigines for murder in 1822 failed for want

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- 12 Atkins J.A. writes: “the Natives of this Country (generally speaking) are at present incapable of being brought before a Criminal Court, either as Criminals or as Evidences; that it would be a mocking of Judicial Proceedings, and a Solecism in Law ...”: “Richard Atkins opinion on Treatment to be Adopted Towards the Natives”, 20 July 1805 *Historical Records of Australia (HRA)* 1:5 at 502-04. See also the case *R. v. Miller*, (7 February, 1824) *Decisions of the Superior Courts of New South Wales, 1788-1899*, Macquarie University, <<http://www.law.mq.edu.au/scsw/>>.
- 13 This racial instability persists to this day: see Katherine Biber, *Captive Images: Race, Crime, Photography* (Abingdon: GlassHouse Press, 2007). The unidentifiability of Aborigines remained an ongoing problem for the courts, as did their inability to testify against themselves or others. See *R. v. Hatherly and Jackie*, (31 December 1822); *Sydney Gazette*, 2 January 1823; *Decisions of the Superior Courts of New South Wales, 1788-1899*, Macquarie University, <<http://www.law.mq.edu.au/scsw/>>. For the ongoing problem posed by Aboriginal identity, see comments by the Colonial Secretary calling for legislative reform of the rules of evidence: “the difficulty of identifying them prevents their being punished and their inadmissibility as Witnesses prevents them from obtaining redress when injured by Europeans”: Discussions in Major Sullivan’s letter 31 January 1833, Matters Scheduled for the Governor for Decision, 4/441, Schedule No. 7, *State Records, New South Wales* (Matters Scheduled for Decision, 4/441, SR NSW).
- 14 See Richard Atkins on this point: “Richard Atkins opinion” *supra* note 12 at 502-04. Mow-watty’s Aboriginality and his incapacity to give evidence may have influenced both his prosecution and execution. Our survey of early case law confirms Paula Byrne’s suggestion that most rape cases before 1820 focused on the rape of old, married, or pregnant women, and young girls aged between five and ten (that is, women deemed sexually unavailable. Hannah Russell—a teenager—is not the typical prosecutrix of a rape case. Her credibility as a victim may have been determined by Mow-watty’s identification by settlers as a potential rapist: see P. Byrne, *Criminal Law and Colonial Subject: New South Wales 1810–1830* (Melbourne: Cambridge University Press, 1993), 109-110. See also G.D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (Annadale: Federation Press, 2002), 121, 123. Execution was also an atypical outcome for a rape case. Of the approximately 16 rape cases with settler defendants tried before 1816 (and found to date), only two were executed: see *R. v. Bevan*, (1804) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1149], 187; *R. v. Donovan* (1814) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1121], 394; four instances where the prisoner was transported and/or sentenced to lashes: see for example *R. v. Wright* (1789) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1147A], 141 (initially sentenced to death, but pardoned and sentence reduced to transportation); *R. v. Marshall and Ors* (1795) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1147B] (prisoners sentenced to lashes); *R. v. Daily* (1805) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1149], 241d (transportation/gaol/and lashes); *R. v. Redmond* (1808)) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1149], 534 (guilty of a lesser charge and sentenced to lashes and transportation); and the remainder were acquitted or discharged, see: *R. v. Owens* (1799) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [X905], 221; *R. v. Mayhew* (1800) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [X905] (discharged); *R. v. Burke*

of evidence, despite the fact that the two men accused, Hatherly and Jackie, admitted their involvement and each swore that the other was principally responsible for the crime.¹⁵

Finally, however, Mow-watty was a suspect defendant because his Aboriginality contained within it the promise of an alternative social and legal order, separate from and not governed by settler courts. In early New South Wales, his Aboriginality placed him, *prima facie*, outside colonial law. Before 1816, serious Indigenous crimes against settlers constituted acts of aggression and the threat of war.¹⁶ Indigenous depredators, murderers and highwaymen were uniformly treated either as enemies of the state or as curi-

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- (1807) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1149]; *R. v. Davis* (1808) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1150]. 129; *R. v. Blackstock*, *R. v. McDonald*, *R. v. McCloud* (1814) State Records NSW, *Court of Criminal Jurisdiction Minutes of Proceedings* [5/1121], 178; there is no definitive evidence of conviction in the following trials: *R. v. Catherine Halfpenny* (1809) State Records NSW, *Miscellaneous and Defence Papers* [5/1152], 323 (only female prison record); depositions of witnesses taken in the following two trials with no conviction record: (*Laurence Finland*) State Records NSW, *Miscellaneous and Defence Papers* [5/1152], 397; (*Michael Bryant*) State Records NSW, *Miscellaneous and Defence Papers* [5/1152], 381.
- 15 *R. v. Hatherly and Jackie*, *supra* note 13; *Sydney Gazette*, 2 January 1823; *Decisions of the Superior Courts of New South Wales, 1788-1899*, Macquarie University, <<http://www.law.mq.edu.au/scnsw/>>.
- 16 Re state-sponsored violence against Aborigines and Aboriginal war: Extract from Orderly Book, 22 February 1797, B. Kercher, B. Salter & L Ford, *Original Documents on Aborigines*, online: Macquarie University with State Records NSW <<http://www.law.mq.edu.au/scnsw/Correspondence/>>; Government and General Orders, 1 May 1801 *HRA* 1:3 at 250; see also undated order copied as enclosure to dispatch, King to Hobart, 30 October 1802 *HRA* 1:3 at 800; *Sydney Gazette*, 17 June 1804; King to Hobart, 14 August 1804 *HRA* 1:5 at 17-18; Government and General Orders, reprinted from *Sydney Gazette*, 28 April 1805, *HRA* 1:5 at 820; Instructions to Captain Shaw, 9 March 1816, *CSP*, SR NSW, 4/1734, R6045, 164. On Macquarie's "satisfaction" that "the several parts of their Instructions" had been carried out, see: Macquarie's Diary, 4 May 1816, Macquarie Papers, Mitchell Library, A773; Government and General Orders, 20 July 1816, *CSP*, SR NSW, SZ1044, at 226-31. Generally, see: John Connor, *The Australian Frontier Wars, 1788-1838* (Sydney: UNSW Press, 2005). Re diplomacy: Negotiations over the surrender of Pemulwey – Philip King to Hobart, 30 October 1802, *HRA* 1 at 3, 582; Samuel Marsden's negotiations with hostile Aborigines: *Sydney Gazette*, 5 May 1805; and negotiations by magistrates, attempting to discover grievances: *Sydney Gazette*, 22 December 1805. For King's negotiations with hostile Aborigines, see King to Camden, 30 April 1805, *HRA* 1:5 at 306-07. For Macquarie's diplomatic efforts, see: Macquarie's Diary, 6 June 1816, MLA773, 259, "Bidjee Bidjee Brought in Coggie the late chief of the Cow Pasture Tribe, who made his submission, delivered up his arms, and promised to be friendly in future to all White People." Diary Macquarie's Diary, 12 January 1817, MLA773: Narrang Jack, an outlawed native, visited to take "the benefit" of the clemency offered to him by proclamation. Another tribe visited the Governor on the same day. For Governor Brisbane, see: Thomas Brisbane to Bathurst, 14 February 1824, *HRA* 1:11 at 226. For late efforts at diplomacy, see: Macalister to Colonial Secretary, 24 January 1831, Colonial Secretary's Correspondence, Special Bundles, Aboriginal Outrages 1830-1, Golburn Plains, 4/8020.2, State Records of New South Wales (SB: Aboriginal Outrages, SR NSW). Generally, see R.H.W. Reece, "Feasts and Blankets: The History of Some Early Attempts to Establish Relations with the Aborigines of New South Wales, 1814-1816" (1967) 2(3) *Archaeology and Physical Anthropology in Oceania* at 190-206.

osities. Though at least 17 Aborigines had been incarcerated in the colony before 1816, all were held as hostages, not criminals.¹⁷

In the long history of Anglophone projects of settlement, the absence of cases involving Indigenous people would be unremarkable. In the first centuries of settlement in North America, Indigenous theft and violence usually fell outside colonial jurisdiction, unless some special proximity, geographical, cultural or political, drew them inside the law.¹⁸ However, in the context of New South Wales historiography this absence is unsettling. British settlement in New South Wales, we are told, was either an exceptional departure from the flexible legal pluralisms fostered by British colonies in much of North America or a more perfect execution of legal argument denying Indigenous people of rights to land and self-governance extant since English colonization began.¹⁹ James Cook's botanist, the celebrated Joseph Banks, assured colonial officials in London that Australia was relatively fertile and thinly inhabited by extremely uncivilized and timid Indigenous people who would recede before European settlement without treaty, cost or violence.²⁰ The first Governor's Instructions for New South Wales asserted sovereignty and territorial jurisdiction over the eastern half of the island-

17 Hostages held until the surrender of Mosquito and Jack: *Sydney Gazette*, 30 June 1805. More were liberated later, *Sydney Gazette*, 7 July 1805; Tedbury: *Sydney Gazette*, 4 August 1805; Re surrender of Mosquito and Bulldog: "Richard Atkins opinion" *supra* note 12 at 5002-4; King to Camden, 20 July 1805, *HRA* 1:5 at 496. See arrest and release of John Randall: *R. v. Randall*, Bench of Magistrates, R655 SZ767, 83, SR NSW. We are indebted for this reference to Victoria Gollan: Aboriginal Colonial Court Cases, 1788-1838, SR NSW, online: New South Wales Records <<http://records.nsw.gov.au/indexes/searchform.aspx?id=1>>; Arrest of anonymous highwayman: *Sydney Gazette*, 3 June 1815; *Sydney Gazette*, 17 June 1815.

18 Lisa Ford, "Empire and Order on the Colonial Frontiers of Georgia and New South Wales" *Itinerario* 30 (2006), at 95-113; Mark Walters, "The Extension of Colonial Criminal Jurisdiction over the Aboriginal Peoples of Upper Canada: Reconsidering the *Shawanakiskie Case* (1822-1826)" (1996) *University of Toronto Law Review* 46 at 273-310, and Mark Walters, "*Mohegan Indians v. Connecticut* (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" online (1 January 2007) *Osgoode Hall Law Journal* 33:4 at 785-829. Contrast Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630-1763* (Middletown, Conn: Wesleyan University Press, 1986).

19 On this point, see Patrick Wolfe who argues that all settler projects are "premised on displacing indigenes" Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999) at 26-33; and Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006). For an account of the early deployment of the doctrine of *res nullius* (a thing belonging to no one), a concept which evolved into *terra nullius* (land belonging to no one), can be found in Andrew Fitzmaurice, *Humanism and America: An Intellectual History of English Colonisation, 1500-1625* (Cambridge: Cambridge University Press, 2003) at 137-148.

20 Stuart Banner, "Why Terra Nullius? Anthropology and Property Law" (2005) *Law and History Review* 23(1) at 95-132.

continent, and with complete disregard for Indigenous rights.²¹ Meanwhile, late-eighteenth-century legal philosophy asserted with unprecedented confidence that Indigenous Australians and people like them had no magistrates, law, land rights or sovereignty.²² On these grounds some scholars assume that the British came to Australia with every intention of treating Indigenous people as subjects, governed by British law.²³ However, as new and old legal history has shown, courts, governors and leading men took decades to treat Aboriginal people as subjects.²⁴

The trial of Mow-watty suggests that something very different was happening on the ground in New South Wales. The fact that this was the first Court of Criminal Jurisdiction case involving an Aborigine suggests that settlers and administrators did not assume before 1816 that they had legal authority to try or to govern Indigenous people.²⁵ More importantly, the case

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- 21 First Commission of Governor Phillip, “Statute 27 Geo. 3: The Act of Parliament, 27 Geo 3, c. 2” Jurisdiction over this “place or settlement” was given to local courts by the Charter of Justice, *HRA, Series 4, Legal Papers* (Sydney: The Library Committee of the Commonwealth Parliament, 1914) at 3-5; Second Commission, 2 April 1787, 12 October 1786, *HRA, Series 1, Governors’ Dispatches to and from England*, vol. 1 (Sydney: The Library Committee of the Commonwealth Parliament, 1914-1925) at 2-16, 13, cf 9. Compare nearly identical jurisdictional provisions in North American Colonial Charters. See for example, Charter of Virginia, in *America’s Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance*, vol. 2, ed. by Jon L. Wakelyn (Westport, Conn.: Greenwood Press, 2006) at 28-32 and Charter of Georgia, in *America’s Founding Charters*, vol. 2 at 511-520.
- 22 Bruce Buchan, “The Empire of Political Thought: Civilization, Savagery and Perceptions of Indigenous Government” (2005) 18(1) *History of the Human Sciences* at 1-22; see also Wolfe, *supra* note 19 at 26-33.
- 23 For example, Banner, *supra* note 20 at 95-132; Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge, Mass: Harvard University Press, 2007) at 13-46; Buchan, *ibid.* at 1-22; Damen Ward, “‘Savage Customs’ and ‘Civilised Laws’: British Attitudes to Legal Pluralism in Australasia, c. 1830-48”, (2004) *London Papers in Australian Studies* 10 at 1-34; Bain Attwood, *Telling the Truth about Aboriginal History* (Sydney: Allen & Unwin, 2005) at 124-35. Contrast more nuanced accounts by Bruce Kercher, *An Unruly Child: A History of Law in Australia* (St Leonards, NSW: Allen & Unwin, 1995) at 3-21. Much of this literature responds directly to Henry Reynolds’s assertion that late eighteenth century legal theory supported Indigenous sovereignty: Henry Reynolds, *Aboriginal Sovereignty: Three Nations, One Australia?* (St Leonards, NSW: Allen & Unwin, 1996); *Law of the Land* (Ringwood, Vic: Penguin, 1992).
- 24 Bruce Kercher, “The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836” in A.R. Buck, John McLaren & Nancy Wright, eds., *Land and Freedom: Law, Property Rights and the British Diaspora* (UK: Ashgate Publishing, 2001) at 83; Lisa Ford, “Empire and Order”, *supra* note 18 at 95-113; Julie Evans, *Edward Eyre: Race and Colonial Governance* (Dunedin, NZ: University of Otago Press, 2005) at esp. 17-52.
- 25 For example, see “Richard Atkins Opinion” *supra* note 12 at 502-04. More importantly, see Governor King’s discussion of the arrest and transportation of Mosquito and Bulldog: King to Camden, 20 July 1805, *HRA* 1:5 at 496. See the arrest and release of an unnamed highwayman: *Sydney Gazette*, 3 June 1815; *Sydney Gazette*, 17 June 1815. See also, Macquarie’s transportation of Dual or Dewall in 1816: Government and General Orders, 30 July 1816, *CSP*, SZ759, R6038, 232-3, SR NSW. See also, Macquarie’s assumptions about Aboriginal legal

marks strict boundaries around British jurisdiction in New South Wales—assuming Indigenous legal independence even as it claimed the first Aboriginal man for British law. Witnesses, whose evidence was recorded in the *Sydney Gazette* case report, all justify Mow-watty's trial on bases that have nothing whatever to do with the claims of British sovereignty or territorial jurisdiction contained in the *Charter of Justice* of 1787. Instead, the case report centres on Mow-watty's exceptionality, highlighting his liminality as a defendant by stressing his cultural, moral, physical and legal affinities with the colonial state.

First, the transcript of testimony published in the *Sydney Gazette* makes clear that Mow-watty allegedly raped and stole from Hannah Russell near a country lane joining the relatively populous town of Parramatta to the farms of leading settlers, like John Macarthur. Therefore, Mow-watty's crime occurred in an area rapidly being demarcated as settler space.

Second, witnesses asserted that Mow-watty was no longer truly native and therefore came within the purview of settler law. Each witness cast Mow-watty as a symbol of the thickening bonds of colonization. As an adoptee, long-time guide, translator and one of exceptionally few Indigenous people to visit Britain, Mow-watty was a morally and culturally liminal man. Mow-watty, they said, admired British culture, was well acquainted with British customs and understood the difference between right and wrong.²⁶ An intimate of the colonial elite should, they all implied, be an intimate of the colonial legal system.

Still others noted Mow-watty's physical and legal proximity to settler-workers in the sense that he was not treated as an Aborigine in context or contract. John Shee, the stockman who interrupted Mow-watty's assault, declared that he had worked beside Mow-watty on a farm at Pennant Hills. Shee considered "the prisoner to be in the common habits of life of labouring persons; he worked as other labourers, and lived in the same way."²⁷ James Oldgate, constable of Parramatta went further. He "had known the prisoner at the bar twelve or thirteen years"²⁸ and in the course of their acquaintance, Mow-watty had told Oldgate himself that he "could not live in the bush now, from his being habituated to the white people's mode of living."²⁹ Mow-watty's habituation came with peculiar legal advantages. Unlike many Aborigines in early New South Wales,³⁰ Mow-watty "worked

status in Proclamation, March 1817, *Original Documents on Aborigines and the Law*, 1790-1840, Macquarie University, <<http://www.law.mq.edu.au/sensw/Correspondence/12.htm> />.

26 See the evidence of Samuel Marsden and Robert Lowe: *R. v. Mow-watty*, *supra* note 2.

27 *R. v. Mow-watty*, *supra* note 2.

28 *R. v. Mow-watty*, *supra* note 2.

29 *R. v. Mow-watty*, *supra* note 2.

30 With the marked exception for Aboriginal sailors: for example, the well-known Aborigine Bungarree served with the Royal Navy, sailing with Captain Flinders and Captain Phillip King

with any other labourer, received wages, and lived as labourers generally do.”³¹

The most important testimony, however, came from Mr. Gregory Blaxland, Esquire.³² Blaxland attested to Mow-watty’s intelligence and to his linguistic and cultural competence, but he went further to state that:

.... neither could he doubt that from his constant habits he must be aware of any act that would give offence to our laws and usages; and upon those occasions where it had been found necessary to proscribe certain natives for their atrocities against the settlers, he had always shielded himself under the protection of the law by adhering to the habits in which he had been reared; he knew that crimes were punished by the law, and could not if he committed a crime be ignorant that he was doing wrong.³³

Mr. Blaxland asserted, in short, that Mow-watty placed himself under British laws as a matter of choice, not as a necessary accoutrement of British sovereignty. While other Indigenous people made war, Mow-watty adopted law, placing himself “under the protection of” British law and hence within the reach of British courts. Whether Blaxland knew it, “protection” itself was a term of art used to describe either the status of individual foreigners residing in Britain or the status of a weak sovereign under the thrall of a stronger one. Neither status necessarily implied the loss of individual liberties or of corporate sovereignty, though individual sojourners under “protection” usually fell within the jurisdiction of their host sovereign.³⁴ Blaxland used protection anomalously here to indicate an act of individual Indigenous choice to come within British law. In this reckoning, Mow-watty was tried and convicted in 1816 not because the British were sovereign in New South Wales, but because Mow-watty had personally accepted the legal protection of British law.

Mow-watty’s trial thus attests to the depth and breadth of legal pluralism in the colony of New South Wales before and after 1816. However, Mow-watty’s trial was also a radically new act of jurisdiction that showed the investment of the New South Wales government in trying to expand the

amongst others; see: *Sydney Gazette*, 27 November 1830; see also Matthew Flinders, *A Voyage to Terra Australis*, vols 1-2 (1814), ed by Libraries Board of South Australia (Adelaide: Libraries Board of South Australia, 1966); P. King, *Narrative of a Survey of the Intertropical and Western Coasts of Australia*, vols 1-2 (1827) (Adelaide: Libraries Board of South Australia, 1969); E. Scott, *The Life of Captain Matthew Flinders* (Sydney: Angus & Robertson, 1914).

31 *R. v. Mow-watty*, *supra* note 2; *Sydney Gazette* (28 September 1816).

32 Gregory Blaxland was a significant landholder by 1816 and contributed to the early cultivation of livestock in the colony. Smith, *supra* note 3, writes: “In court, Marsden, Gregory Blaxland and others testified that Daniel understood the difference between good and evil.”

33 *R. v. Mow-watty*, *supra* note 2; *Sydney Gazette* (28 September 1816).

34 On foreigners: Vattel, *Law of Nations, or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (London: G.G. and J. Robertson, 1797) vol. 2, chap 8 at 172. On treaties: Vattel, vol. 2, chap. 12 at 193.

geographical and juridical reach of British government in the colony.³⁵ Mow-watty was, after all, the first Indigenous man to be tried by a Superior Criminal Court in New South Wales. Government efforts set a framework for real change. Eight years later, the Court of Criminal Jurisdiction tried the first Aborigines accused of murder, thus beginning the first sustained effort to extend jurisdiction over Aborigines in the history of the colony. This revolutionary expansion of jurisdiction in the 1820s was unthinkable without the small steps taken in the trial and punishment of Daniel Mow-watty in 1816.

In the following section, we argue also that the case was inextricable with an Empire-wide reform of colonial governance, which was a reform entrenched locally in the new men appointed to administer the colony and courts of New South Wales after 1810. Mow-watty's trial was one of a number of initiatives undertaken by the governor of New South Wales and his legal officers that signalled a significant change in the way they conceptualized the relationship between Indigenous people, British Empire and the colonial state. We argue that, placed in the context of the government's response to widespread Aboriginal violence in 1816, Mow-watty's trial takes on new significance as a turning point in the history of British sovereignty in New South Wales.

III 1816, INDIGENOUS PEOPLE AND THE COLONIAL STATE IN NEW SOUTH WALES

Mow-watty's trial is only one of a series of measures undertaken by Governor Lachlan Macquarie and his legal officers to recast the relationship between Indigenous people and the British colonial state in 1816. These measures, though often contradictory, constituted quite unrecognizable, but nevertheless novel, assertions of British authority over Indigenous people.

Lachlan Macquarie was a military officer who was sworn into office as Governor in 1810. Macquarie came to re-establish order after settlers, discontented with Governor William Bligh's attempts to reorder trade, land grants and convict assignments in the colony, arrested Bligh and sent him back to England.³⁶ Macquarie's regime attempted to consolidate the infrastructure, to recast society, and to engage worthy emancipated convicts and engagement with local Aborigines. He was accompanied to New South

35 On the broad powers of the Governor in the colony see Bruce Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Sydney: The Federation Press, 1996) at 6-9. On powers of governors see Alex Castles, *An Australian Legal History* (Sydney: Law Book Company, 1982) at 5-6, 130-31, 384-90. On autocracy of governors see Kercher, *supra* note 23 at 35-37, 48-49, 67-70, 85.

36 Governor William Bligh succeeded Philip Gidley King as Governor of NSW in 1806. See the commentary below on the coup against Bligh.

Wales by the second legally trained judge advocate to come to the colony, Ellis Bent. The arrival of Ellis Bent was the beginning of judicial independence in Australia. He advocated reform of the colony's courts. Complex causes required more formal procedures, and Bent strongly advocated a move away from the military administration of the criminal court. His desire for reform slowly began to filter into court procedure and the courts' jurisprudence through the clearer articulation of legal principle.³⁷ Bent was soon followed by his brother Jeffery who was to administer civil law in the colony.³⁸ The Bents were subsequently replaced by Baron Field and John Wylde, also highly trained lawyers. Between 1810 and 1816, Macquarie and his legal officers regularized and recast legal practice in New South Wales, forging a path between local practice and English precedent.³⁹ By 1816, several years of escalating Indigenous-settler violence on the frontiers of New South Wales combined to fix their attention on the relationship of Indigenous people with the colony as a military, legal and practical issue.

The most important of the Macquarie regime's efforts to grapple with Indigenous people came in May of 1816 when Macquarie issued a Proclamation that, in effect, declared war on the frontiers of the colony. The western portions of the colony from Windsor to the Nepean River had been in uproar since 1814 as a number of Indigenous peoples mounted a sustained campaign against the expansion of settlement in the region. Macquarie had sent some early expeditions of convicts and Indigenous people to broker peace and capture some ringleaders of the violence.⁴⁰ By 1816, however, Macquarie was goaded into proscribing Indigenous people from farms on the peripheries and to asserting more consistent controls over them in the centres of settlement.

The Proclamation declared first, that no "Black Native or Body of Black Natives shall ever appear at or within one mile of any Town, Village, or Farm occupied by or belonging to any British subject, armed." Second, it declared that "no number of Natives exceeding in the whole six persons being

37 Bent did not leave us formal written judgments, though he did give extensive, well-reasoned summaries of the law and facts in some criminal cases, such as *R. v. McNaughton and Connor*, (July 1813) Decisions of the Superior Courts of New South Wales, 1788-1899, Macquarie University, <<http://www.law.mq.edu.au/scnsw/>>. For formal written judgments the colony had to await the arrival of Wylde J.A. and especially Field J. A number of the reforms that Bent suggested were implemented in the civil jurisdiction, but not in the Court of Criminal Jurisdiction: Letters Patent for Courts of Civil Judicature 4 February 1814 (2) (Second Charter of Justice)—promulgated 12 August 1814.

38 See generally C.H. Currey, *supra* note 7.

39 For a discussion of the challenges of adapting English law to the NSW Colony in the first 40 years of settlement, and to examine a selection of cases of the Bent brothers, Wylde, Field and other judges of the period, see generally Kercher and Salter, *supra* note 6.

40 See also, Macquarie, Instructions to John Warby and John Jackson, 22 July 1814, CSP, SR NSW, 4/1730, R6044 at 218-23.

entirely unarmed shall ever come to lurk or loiter about any farm in the Interior.” Violation of either provision would result in the offending Natives being considered “enemies” of the colony and treated accordingly. These provisions echoed earlier responses to Aboriginal violence in the colony by declaring war against Indigenous people. Though British violence against Indigenous people very viscerally asserted the dominance of British arms in the colony, we argue that it was not a radical assertion of sovereignty. It was conducted and arguably understood instead as retaliation according to contemporary understandings of either the laws of war or of the law of nature. Retaliation was fundamental to both.⁴¹

The most important provision of the Proclamation did not deal with the pacification of the Western frontiers, however. Instead it provided that:

The practice hitherto observed amongst the native Tribes of Assembling in large bodies or parties armed, and of fighting and attacking each other on the plea of Inflicting punishment on Transgressors of their own customs and manners at or near Sydney, and the principal Towns and settlements in the Colony shall be henceforth wholly abolished as a barbarous Custom repugnant to the British Laws Any armed body of Natives therefore who shall assemble for the foregoing purposes either at Sydney or any of the other settlements of their colony after the said fourth day of June next, shall be considered as Disturbers of the Public Peace and shall be apprehended and punished in a summary manner accordingly. The Black Natives are therefore hereby enjoined and commanded to discontinue this barbarous custom not at or near the British Settlements, but also in their own Wild and remote places of resort.⁴²

This article provided that Aborigines visiting major settlements armed with a view to effecting Indigenous jurisdiction over Indigenous offenders would not be considered enemies. Rather, Aborigines bent on effecting tribal law in the few urban centres of the colony—even if it resulted in the death of Aboriginal people—would be treated as disturbers of the public peace.

This last provision contained a far more radical claim to imperial authority than the threat to treat Aborigines visiting the fringes of the colony as enemies. Colonial administrators had treated Aboriginal violence as enmity since 1788.⁴³ By attempting to force Aboriginal intra-tribal customary law out of the settlements of New South Wales, however, Macquarie made new claims to jurisdiction over Indigenous people in New South Wales. He asserted, first, that Aboriginal customary law could be displaced by a new

41 See Grotius, *The Law of War and Peace: De Jure Belli ac Pacis*, first published 1625, Books 1-3 trans. by Francis Kelsey (Indianapolis: Bobbs Merrill, 1962). In Book 1 (Chapters 1-5) Grotius advances his argument of war and natural justice.

42 “Proclamation, 4 May 1816” (MLA753) and *Original Documents on Aborigines*, online: Macquarie University <<http://www.law.mq.edu.au/scnsw/Correspondence/>>, at 24-36.

43 John Connor, *The Australian Frontier Wars, 1788-1838* (Sydney: UNSW Press, 2005) see Chapter 2.

category of spatial order—the public peace. Yet that order did not spread beyond the major clusters of British settlement. Second, he asserted that in this place, Aborigines' barbarous customs should be (rather than would be) replaced by British law. Indigenous people would not be prosecuted for murdering one another in Sydney; they would be prosecuted for disorderly conduct.

This section of the Proclamation invoked a particularly liberal (and by 1816, an anomalous) understanding of the laws of conquest. The *Case of Tanistry* in 1608 held that in a conquered country like Ireland, local law subsisted until displaced by the King. However, British conquest automatically invalidated any local customary laws that were of their nature “barbarous” or against natural law. Despite contradictory dicta in *Calvin's Case*, the notion of (largely fictive) conquest held sway in most metropolitan and peripheral ruminations about Britain's North American colonies before the Revolution.⁴⁴ By the end of the eighteenth century, a new orthodoxy prevailed. In it, Australian Aborigines were a people so savage that they were unable to claim property or to constitute political society.⁴⁵ Though this last claim would one day prompt New South Wales courts to deny the legal validity of Indigenous customary law, it clearly did not hold sway in 1816.⁴⁶ Macquarie did leave legal and geographical space for the continuation of Indigenous customary law, just not on the streets of Sydney and Parramatta. In Macquarie's understanding, and likely that of his legal officers, the public peace was an incomplete territorial order. This peculiar spatial order was not one of perfect territorial jurisdiction and it accommodated the operation of Indigenous customary law.

44 *Tanistry Case* (1608) Dav 28; 80 ER 516; *Calvin's Case* (1608) 7 Coke Report 1a, 77 ER 377. On the Irish context of this case, see Hans S. Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge: Cambridge University Press, 1985). On the persistence of this notion “conquest” versus “settlement” in North America, see Jack Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607–1788* (New York: W.W. Norton, 1990) at 43; and Daniel Hulsebosch, “The Ancient Constitution and the Expanding Empire” (2003) *Law and History Review* 21:3 at 470-475. On change in legal approach at the end of the eighteenth century, see Craig Yirush, “Conquest Theory and Imperial Governance in the Early Modern-Anglo-American World, Clark Library Conference on Imperial Models in the Early Modern World” (Paper presented to the Clark Library Conference on Imperial Models in the Early Modern World, Los Angeles, 3-4 November 2006) [unpublished]; Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Sydney: McLeay Press, 1995) Chapter 12. For the continued significance of *Tanistry Case*, see Shaunnagh Dorsett, “‘Since Time Immemorial’: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry” (2002) *Melbourne University Law Review* 33 at 32-59.

45 Buchan, *supra* note 22 at 1-22.

46 *R. v. Murrell*, 1 Legge 72, NSW SC; cf Buchan, “The Empire of Political Thought,” *ibid.* at 22, and Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Paddington, N.S.W.: Macleay Press, 2005).

Within days of delivering his Proclamation of war and partial spatial order, Macquarie directed three detachments of soldiers to Liverpool Plains, the Cow Pastures and Windsor with instructions to capture rather than kill as many Aborigines as possible and to bring them to Sydney where they might be “dealt with according to Justice.”⁴⁷ His instructions left ample room for the summary murder of Aborigines who fled from soldiers. They were instructed to ask hostile groups to surrender and to shoot only those Aborigines who resisted or who ran away. If violence was necessary, he ordered his soldiers, where possible, to punish the guilty and spare the innocent, especially women and children. At the Governor’s express request, however, murdered Aboriginal men (guilty or innocent) were to be “hanged up on trees.”⁴⁸ Throughout, Macquarie’s instructions show that he had his heart set on some new (but unrecognizable) notion of British sovereignty in New South Wales.⁴⁹ However, his instructions all explicitly established violence rather than jurisdiction as the colonial state’s primary response.

Under his instructions, an unprecedented number of Aborigines found their way into the jails of Sydney in 1816.⁵⁰ Yet even the incarceration of 22 Aborigines did not amount to an assertion of colonial jurisdiction over all Indigenous crime in the colony. Of those incarcerated, 15 were women and children held purely as hostages both to control information about the movement of troops.⁵¹ These prisoners fitted into a long tradition of hostage-taking and negotiation in New South Wales.⁵²

Macquarie talked and thought about his hostages in new ways, however. He did not release them in return for the surrender of suspected murderers or a cessation of hostilities. He released most in honour of the King’s Birthday—a celebration on which pardons were given and fetes held for British pris-

47 Government and General Orders, 20 July 1816, Colonial Secretary’s Papers, 1788-1825, State Records of New South Wales, SZ1044, R6038, at 226-31 (CSP, SR NSW). See also, Macquarie, Instructions to John Warby and John Jackson, 22 July 1814, CSP, SR NSW, 4/1730, R6044, at 218-23; Circular to Magistrates re action to be taken against Aborigines in various districts for cruelties and excesses committed, 9 April 1815, CSP, SR NSW, 4/3494, R6004, at 448-49.

48 Instructions to Captain Shaw, 9 March 1816, CSP, SR NSW, 4/1734, R6045, 164. On Macquarie’s “satisfaction” that “the several parts of their Instructions” had been carried out, see: Macquarie’s Diary, 4 May 1816, Macquarie Papers, Mitchell Library, A773.

49 Government and General Orders, 20 July 1816, Colonial Secretary’s Papers, 1788-1825, State Records of New South Wales, SZ1044, R6038, at 226-231 (CSP, SR NSW); and see, Macquarie, Instructions to John Warby and John Jackson, 22 July 1814, CSP, 4/1730, R6044, at 218-23, SR NSW.

50 Macquarie’s Diary, 15 November 1816 and 3 June 1816, Macquarie Papers, A773, Mitchell Library.

51 This was done at Macquarie’s request: Instructions to Captain Shaw, 9 March 1816, CSP SR NSW, 4/1734, R6045, at 164.

52 Arrest of 11 Aborigines, 1805: *Sydney Gazette*, 30 June 1805. More were liberated later, *Sydney Gazette*, 7 July 1805; *Sydney Gazette*, 4 August 1805. Transportation of Mosquito and Bulldog: King to Camden, 20 July 1805, *HRA* 1:5 at 496.

oners of the Crown. Macquarie's diary note about the incident is significant: he noted that he had "released all [but one of] the Black native Prisoners who were some time since taken and confined in jail on suspicion of being concerned in the recent Hostilities." By extending the King's mercy to these Aborigines, and labelling them suspects, Macquarie applied to them the words, but not the substance, of subjecthood and law.⁵³

When his military regiments failed to capture many Aboriginal depredators, Macquarie ordered settlers, magistrates and friendly Aborigines to "seize upon and secure ..." 10 Aboriginal named men.⁵⁴ This was also an innovation. In May 1801, Governor King had specifically refrained from outlawing Aborigines for violence against settlers. Instead, King outlawed two convicts in league with Aborigines, at the same time as he ordered retaliatory violence against their Aboriginal partners in crime.⁵⁵ In December of 1816, Macquarie ended hostilities by inviting outlawed Aborigines not already killed or apprehended to "surrender and give themselves up" in order to be "forgiven and pardoned for their past Offences, and taken under the Protection of the British Government in the colony."⁵⁶ His offer is a jumble of diplomacy and jurisdiction. He suggests here and elsewhere that Aborigines (whether outlawed or not) had yet to submit themselves to His Majesty's protection and, perhaps more importantly, that they had some corporate or individual choice in the matter.⁵⁷

The limits of the Macquarie regime's efforts to recast Indigenous legal status are evident finally in the transportation of an Aboriginal leader named Dual (or Dewall) to Van Diemens Land for his suspected role in the widespread destruction of property and a number of murders in the western reaches of the colony. In accordance with unusually specific instructions from Sydney, Dual was captured by local settlers, placed in a local jail, where he was recovered by troops, marched to Sydney, and held in custody until his transportation for seven years from the colony without trial. According to his own accounts, Macquarie used the power "vested in" him to

remit the Punishment of Death, which his repeated Crimes and Offences had justly merited ... And commute the same into Banishment from this part of His Majesty's Territory of New South Wales to Port Dalrymple, in Van Diemens Land, for the full Term of Seven years.⁵⁸

53 Macquarie Diary, 4 June 1816, Macquarie Papers, A773, 258-9, Mitchell Library; Macquarie Diary, 15 November 1816, Macquarie Papers, A773, Mitchell Library. Some of the children were detained and sent to the Native Institution. The five other men held in connection with hostilities were released with "blankets, provisions and pardons" on 15 November 1816.

54 Government and General Orders, 20 July 1816, *CSP*, SR NSW, SZ1044, at 226-31.

55 Government and General Orders 11 May 1801, *HRA* 1:3 at 251.

56 Government and General Orders, 21 December 1816, *CSP*, SZ 758, R6038, SR NSW.

57 Proclamation, *supra* note 42.

58 Government and General Orders, 30 July 1816, *CSP*, SZ759, R6038 at 232-33, SR NSW.

Dual's sentence mimicked a term of transportation: convicts were, at least in popular parlance, "banished" from Britain for a term of years.⁵⁹ However, court records indicate that Dual was not tried for his crime.

It is in this context that Mow-watty's trial for raping Hannah Russell must be understood. Governor Macquarie showed here that he, like his court, understood British sovereignty and British jurisdiction in New South Wales in ways that are unfamiliar to us now. In 1816, they moved, as never before, to bring Indigenous people within the purview of British law. Macquarie pardoned and sentenced Aborigines. Yet neither "sentence" nor "pardon" here were acts of law. He also tried to create a perfect territorial order in British towns while explicitly recognizing the plural spatial orders that existed outside their boundaries. And his court tried and convicted Daniel Mow-watty for rape in a way that illustrates a deep and continuing commitment to legal pluralism that assumed all but the most exceptional Indigenous people should be punished by violence rather than by trial. In 1816, Macquarie and his legal officers stumbled towards a new, more perfect British sovereignty in New South Wales, but in 1816 they lacked the conceptual tools to imagine jurisdiction over Indigenous people.

Indeed, in the Macquarie period, confident judicial statements about British sovereignty and jurisdiction in New South Wales had nothing whatever to do with Indigenous violence. The most explicit endorsement of British sovereignty and territorial jurisdiction had instead to do with wild animals. In 1817, three ordinary settler men, named Fork, Brennan and Riley, killed some of the wild cattle populating the Cow Pastures which bordered the Nepean River on the western boundaries of settlement. They were charged with the capital crime of stealing government cattle before the Court of Criminal Jurisdiction. In their defence, Fork, Brennan and Riley argued that the government had no right to charge them with theft because it did not own the beasts. They were strays or *ferae naturae* which settlers could hunt at will. The Judge Advocate John Wylde argued in response that the Crown had a special property in the beasts because they wandered on Crown lands:

the law gives [property in the cattle] to the King, as the general owner and lord paramount of the soil, in re-compence for the damage they have done therein. But in respect of occupation, absolute possession *ratione soli*, and as *bona vacantia*, an indefeasible right and property were clearly vested in the Crown;

⁵⁹ See John Dunmore Lang, *An Historical and Statistical Account of New South Wales* (London: Cochrane and M'Crone, 1834) at 16 & 180. Note that the statutes do not mention the word banishment: 29 Eliz. c. 4. For a nineteenth-century account of banishment, see Thomas Erskine May, *The Constitutional History of England Since the Accession of George the Third, 1760-1860* (London: Thomas Armstrong, 1891) at 526.

for possession of the land carries with it to the owner all of valuable property to be found on it.⁶⁰

In this case, the very year after it made such partial inroads into Indigenous legal independence in New South Wales, the Supreme Court of Criminal Jurisdiction produced one of the first—and most complete—articulations of Crown sovereignty, property and jurisdiction over the unsettled regions of New South Wales.⁶¹ It could imagine a territorial legal order governing wild beasts in an empty land, but did not yet associate that order with the destruction of Indigenous self-governance.

In 1816, Macquarie and his legal officers attempted nothing less than a comprehensive re-imagining of British sovereignty in New South Wales. In the process they made large strides towards the modern legal doctrine of *terra nullius*,⁶² while still embracing the long practice of legal pluralism in Anglophone settler colonies.

IV 1816 AND THE REORDERING OF NEW SOUTH WALES AND THE WORLD

The legal watersheds of 1816 have no easy explanation. They are both radically new and unrecognizably old. Macquarie and his legal officers undertook the first sustained attempt to grapple with the legal problem of Indigenous people in the history New South Wales.⁶³ Their solution was novel: predicated on the partial sanctity of British towns, the inclusion of intimate Aborigines within the body politic, and the notion that colonial frontiers were zones of war and not law.

Of all of the watersheds of 1816, the trial of Mow-watty is the most important because it exemplifies the deeply contradictory strains in legal

60 Reported in *Sydney Gazette*, 10 May 1817. Also available online Macquarie University <<http://www.law.mq.edu.au/sensw/>>.

61 Banner suggests that an 1819 tax opinion from the Law Officers in the Colonial Office, London, was the first statement: Banner, *supra* note 23 at 26. In this opinion, New South Wales was not conquered or ceded, but “desert and uninhabited” and therefore Parliament must legislate taxes in “that part occupied”: Law Officers to the Earl of Bathurst, 15 February 1819, The National Archives, Public Records Office, Colonial Office 201/238, f 245-47, Kew Gardens (TNA: PRO CO). The first legal argument that the British Crown owned New South Wales, implying that Indigenous people had no rights, seems also to have been produced in the colony in the first appeal to the Privy Council by emancipist George Crossley: *Lord v. Palmer*, 1803-1809 in Bruce Kercher and Brent Salter, *supra* note 6.

62 The term *terra nullius* occupies a significant position in Australian law and refers to the notion of land belonging to no one: that is, land that has never belonged to a state, or where its previous sovereign has abandoned the exercise of authority over it. Sovereignty over such land may be acquired through occupation and control that amounts to first possession. On *terra nullius* and consideration of the denial of the existence of Indigenous peoples, their law and government see *Mabo v. Queensland (No 2)* (1992) 175 CLR 1.

63 The first, and rather half-hearted attempt was in 1805 when Judge Advocate Richard Atkins declared that Indigenous people in the colony fell under the King’s protection but could not be tried in his courts: “Richard Atkins opinion” *supra* note 12 at 502-04.

thought about Indigenous people in early New South Wales. Because he was the first Indigenous person to be tried and executed by the colonial state, Mow-watty showed what was at stake for Indigenous people in the efforts of Macquarie and his officers to redefine intimate Indigenous violence as crime in 1816. Violent retaliation against Indigenous people on New South Wales's frontiers was devastating for Indigenous Australians, but the extension of jurisdiction was more intimately erosive of Indigenous rights. When Indigenous violence became crime, British law could no longer share space with Indigenous customary law. Mow-watty's trial may have encompassed a lost, plural vision of British sovereignty that shared space with Indigenous people and their laws, but, read in the context of Macquarie's Proclamation of 1816, the trial also signalled a new determination to criminalize Indigenous behaviours, especially near major British settlements. The trial signalled the beginning of a new legal process that acknowledged, but weakened, Aboriginal legal autonomy in the first decades of colonization. From the trial of Mow-watty we gain some insight into the processes of transition from legal pluralism to perfect territorial sovereignty in a moment of profound global change in the theory and practice of settler colonialism.

Mow-watty's trial also shows that a different paradigm prevailed in 1816, though it was a paradigm fraying at the edges. Read in the context of Macquarie's response to frontier violence in 1816, Mow-watty's case shows the extent of legal pluralism in early New South Wales. Mow-watty's intimacy with the colony, its leading men, its culture and its laws alone justified his trial. As the first Indigenous person to be tried by a settler court in New South Wales, he was the exception that proved the rule. Indigenous theft and violence were not crimes in early New South Wales; they were acts of war to be met with violent retaliation (a very different theatre of British power over Indigenous people).

This is particularly important in view of the reform of colonial governance and local legal practice in the Macquarie period. The fact that Mow-watty was the only Indigenous person tried in 1816, though 22 others were incarcerated, shows that highly trained colonial lawyers were invested in legal pluralism in New South Wales. When Macquarie and his legal officers confronted the problem of Indigenous violence they did not assume it fell within British jurisdiction. The fact that their solution to Indigenous violence did not arrive at the modern legal premise that Australian Aborigines should be utterly subordinated to the settler state, incarcerated its prisons and tried in its courts, did not reflect error or misunderstanding. Too many scholars of Australian legal history assume that law came to New South Wales only in 1823 when the first Supreme Court was constituted by statute.⁶⁴ This

64 Kercher, *supra* note 24 at 83. Kercher's own work on early court cases from 1788–1824 has led him to change this view.

assumption trivializes the attempts of Macquarie, and Judge Advocates Bent, Wylde and Field to bring the rule of law to New South Wales and to make sense of the status of the British Crown there. By reading Indigenous legal independence as local nonsense, scholars discount the centrality of legal pluralism to British settler colonialism.⁶⁵ Jurisdiction did not extend to Indigenous crime with any consistency in Anglophone settler polities in North America or Australia before the 1820s.⁶⁶ Thus, by keeping Indigenous people (except for Daniel Mow-watty) out of courts, judicial officers in New South Wales applied old wisdoms. The fact that these old wisdoms governed new men with new ideas in 1816 suggests their hegemony in the metropole and its peripheries in the early decades of the nineteenth century. Accordingly, the trial of Daniel Mow-watty, and the other watersheds of 1816, call us to rethink the meaning of British sovereignty in early New South Wales.

Indeed, in 1816, New South Wales participated in a much larger moment in the history of Anglophone settler colonialism and the modern state. Macquarie's efforts in 1816 are just one step in this global reordering of sovereignty on the one hand, and of settler polities on the other. New scholarship suggests that the theory and practice of sovereignty was reshaped in the nineteenth century, and that territorial jurisdiction was the very mechanism of its transformation. As James Sheehan told us recently, after the Napoleonic Wars, European states themselves came to measure the extent of their sovereignty through their exercise of territorial jurisdiction.⁶⁷ Lauren Benton's groundbreaking work demonstrated the transformation of jurisdictional practice in colonial states either into structure pluralism or perfect territorial sovereignty after the 1820s.⁶⁸ Paul McHugh and others have shown how, from the 1810s to the 1840s, Anglophone settler polities in North America and Australasia all began to exercise jurisdiction over Indigenous crime, many for the first time.⁶⁹ By the middle of the nineteenth century, territorial sovereignty, territorial jurisdiction and Indigenous subordination were lodged in the heart of Anglophone settler polities. In the trial of Daniel Mow-watty we see the sudden beginnings of this process in New South Wales.

65 Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002).

66 Ford, *supra* note 18.

67 James Sheehan, "The Problem of Sovereignty in European History" (2006) *American Historical Review* 111:1 at 1-15.

68 Benton, *supra* note 65.

69 Paul McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford and New York: Oxford University Press, 2004) Chapters 1 and 2; Ford, *supra* note 6; Ford, *supra* note 18.