LOVE THE SINNER : THE CRIME OF ATTEMPTED SUICIDE IN LATE NINETEENTH-CENTURY AUSTRALIA

Greg Taylor[*]

Abstract

By the end of the nineteenth century the former crime of attempted suicide was almost always not an occasion for punishing people who had infringed the moral code, but rather a means of checking on the welfare of would-be suicides by ensuring that they had people to care for them while also conveying to them that their lives mattered to the rest of the community and discouraging them from future attempts at self-destruction. There was some good in having an important state official convey the messages stated to a person who had attempted suicide. Only in rare cases, such as repeated suicide attempts, threats to renew the attempt or a lack of family and friends to care for the would-be suicide was anything beyond a nominal penalty usually imposed. Rather, people were given a jolly good talking-to along the lines indicated and released without further ado or after a short time in prison designed to ensure their welfare.

[*] Fellow of the Royal Historical Society; Professor of Law, University of Adelaide; Honorary Professor of Law, Marburg University; Honorary Professor, R.M.I.T. University. The author wishes to thank Peter Sheppard in addition to those mentioned in fnn 7 and 164 below and also Sophie from the Customer Care Centre of the Greater Metropolitan Cemeteries (Fawkner) and Briony Minehan of the Southern Metropolitan Cemeteries Trust.

1. Introduction

In the Supreme Court of Victoria sitting in Bendigo in October 1895, Mr Justice Holroyd – a Judge who 'savoured a legal nicety as an artist might delight in a fine picture'[1] – postulated that the sentence for attempted suicide could be death.

> The law regarded suicide in the same light as murder, and attempted suicide as attempted murder – capital offences – the penalty for which was death. [His Honour] was of opinion that the only course open to him was to formally pass sentence of death on the prisoner, and then recommend to the executive that a free pardon should be granted her.[2]

When the Crown prosecutor pointed out that s 4 of the *Crimes Act* 1891 (Vic.) made attempted murder punishable by fifteen years' imprisonment, his Honour riposted that s 8 of the *Crimes Act* 1890 (Vic.) still provided for the death penalty for wounding with intent to murder; the accused, a domestic servant aged twenty-two years by the name of Isabella Victoria Emma Watt,[3] had indeed attempted to cut her own throat after she had been suspected of the theft of the fairly small sum of 9*s* by her employer.[4] It must be hoped that she and her family members present were made aware, well in advance of this interesting legal debate, of the unlikelihood that the extreme penalty of the law would actually be inflicted; yet circumstances could be imagined in which a "tough love" approach might try to drive home the finality and awesomeness of death to Miss Watt by suggesting to her mind the possibility of being legally killed by someone else, the instinctive horror that would produce in her and finally the realisation that while the means might differ, the end – quite literally – would be the same if she killed herself. Eventually, however, Holroyd J. looked up further authorities and decided that it was within his power to defer passing sentence altogether and release the young lady on recognisances to come up for sentencing if called upon later (something, as we shall see, that the lowliest Magistrate or even an experienced Justice of the Peace could probably have told him). Miss Watt's employer, a cabinetmaker named Robert Gregory, had given her a glowing reference (the allegation

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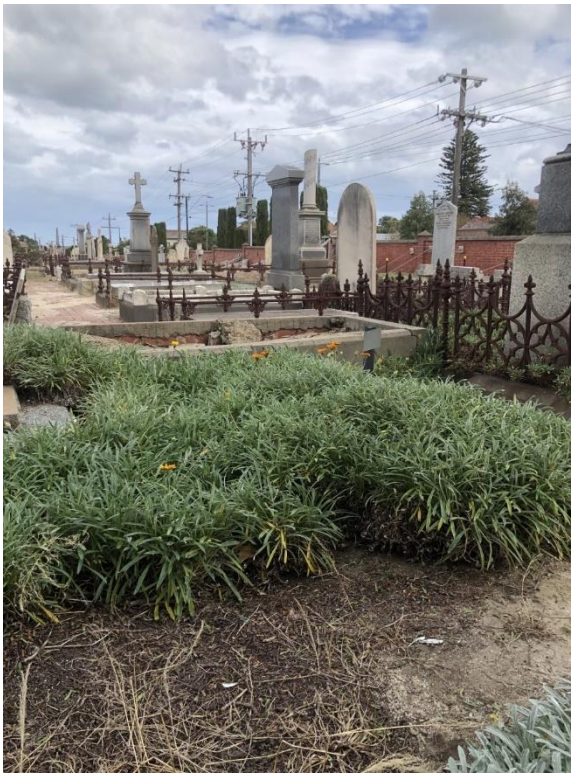
[1] From his biography in the *Australian Dictionary of Biography*.

[2] "Bendigo Advertiser", 18 October 1895, p. 3; see also "Bendigo Independent", 18 October 1895, p. 4. Further details may be found in the same newspaper's editions of 29 July 1895, p. 2.

[3] All the newspapers got her name wrong; the closest approach is in the "Kerang Times", 18 October 1895, p. 2. The name shown in the text is that indicated in the official government records such as VPRS 30/P0/1029/348 and her death notice over fifty years later, below fn 6.

[4] For a rough-and-ready idea of the value of this sum at the time, see below, fn 129.

of theft appears to have been quietly dropped, for one reason or another) and she had family members who promised to look after her; she had also already been on remand awaiting sentence for two days and accordingly had served a very short term of imprisonment.[5] The young lady herself and her brother provided the necessary sureties and she was released without further ado that same afternoon; it may be hoped that she never saw the inside of a courtroom again until her death over fifty years later in 1948.[6]



Isabella Watt's grave, at St Kilda cemetery, is covered in a low green flowering bush, probably gazania, and devoid of any gravestone or other indication of the identity of the occupant.[7]

Although attempted suicide was clearly a crime, the precise legal basis and therefore the penalty for it were evidently unclear, and indeed a debate on this topic may be still found in the recent case of

[5] "Bendigo Advertiser", 16 October 1895, p. 3.
[6] "Age", 18 August 1948, p. 2. As is the case in other parts of this article, occasionally details have been confirmed using publicly available sources such as electoral rolls or the "Ancestry" database. Chapter and verse are not given in such cases. In this case, the "Ancestry" database enables me to be reasonably confident that the spinster named in the death notice in 1948 is the same woman as the domestic servant of 1895 despite the lack of middle names.
[7] I am grateful to my gardening friend Lesley Lonergan for enlightening me about the name of the plant concerned.

"I.L." v. *R*[8] – Kiefel C.J., Keane and Edelman JJ. taking the view that murder at common law had to involve killing another person, not oneself, and even quoting English authority pre-dating Holroyd J.'s by three decades to the effect that attempted suicide by wounding was by parity of reasoning also not punishable if accused and victim were the same person,[9] while Gageler J. (dissenting) essentially adopted the view taken, or almost taken by Holroyd J. 122 years earlier and held that suicide was a crime because it was a species of murder, namely self-murder.[10]

Such interesting but recondite questions are not the subject of this article, however. Rather, the question pursued here is how people were actually punished for attempted suicide in late nineteenth-century Australia. Probably many, if not most readers who know of the former existence of a crime of attempted suicide[11] assume it to be an example of the 'purely moralistic and punitive reaction'[12] often thought to be characteristic of the Victorian era. It appears at first sight to be a way of being unnecessarily horrible and nasty to unfortunate people in life crises and administering a further kick to them when they are down. In fact, however, while no-one would argue for a minute for the reintroduction of this crime,[13] in its time and place the crime of attempted suicide was administered in a unique way – not as a means of punishing the already unfortunate but rather as a sort of primitive form of welfare check together, in many cases, with a declaration by a high official of the state, namely

[8] (2017) 262 CLR 268.
[9] At 272-278.
[10] At 314f.
[11] The offence was abolished by legislation such as the *Crimes Act* 1967 (Vic.) s 2. The first abolition of the offence in Australia occurred in Tasmania. The offence of attempted suicide was included in the *Criminal Code* (Tas.) of 1924 as s 164, but s 164 was repealed by the *Criminal Code Act* 1957 (Tas.) s 3. Thus when Professor Colin Howard came to write his ground-breaking *Australian Criminal Law* (Law Book, Melbourne 1965), he was able to record (at pp. 105f) that, alone among the States, it was not a crime in Tasmania to attempt to effect one's own demise. This also put Tasmania, alone among the States, ahead of England : *Suicide Act* 1961 (U.K.) s 1.
It would appear that repeal in Singapore was effected only by the *Criminal Law Reform Act* 2019 s 89, but see G.K. Goswami, "Decriminalising Attempted Suicide in India : a Paradigm Shift in Approach" (2017) 16 National Capital LJ 21, 34. There is a world-wide overview in Mishara/Weisstub, "The Legal Status of Suicide : a Global Review" (2016) 44 Int Jo Law & Psych 54.
The twists and turns of the crime in India are documented in *Advocate-General of Bengal* v. *Dossee* (1863) 9 Moo Ind App 391; 19 ER 786; Prakash Behere/T.S. Rao/Akshata Mulmule, "Decriminalisation of Attempted Suicide : Journey of Fifteen Decades" (2015) 57 Indian Jo Psych 122; Goswami, above. Effective decriminalisation in that great country appears now to have been achieved in a roundabout and curious way by the *Mental Healthcare Act* 2017 (India) s 115 (1), which runs : '(1) Notwithstanding anything contained in section 309 of the Indian Penal Code any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code'. On Africa, see Cheluchi Onyemelukwe, "Long Overdue : Decriminalisation of Attempted Suicide in Nigeria" (2020) 31 Crim Law Forum 225.
[12] Erwin Stengel, *Suicide and Attempted Suicide* (Penguin, Harmondsworth 1973), p. 72.
[13] In some places it remains unrepealed (see above, fn 11), and accordingly arguments must still be made in favour of doing so, as in Onyemelukwe, above n 11 at 236-244.

a Judge or Magistrate, to the effect that the would-be suicide's life had value both to himself and to the community alongside a pep talk about not doing it again. By means of a survey of press reports of Court proceedings in the last two decades of the 1800s along with other primary sources such as prosecution files – although, as with other studies of suicide, the available data are so vast that no one study could hope to encompass them all[14] – these points will now be expanded upon.

2. Background

a. Suicide in late nineteenth-century Australia

Many things in our society would seem strange and unfamiliar to the people of the late Victorian era, but the general statistical contours of death by suicide would not be one of them. In this respect the behaviour of Australians has shown a remarkable constancy over time – at least, as far as statistics, methods and motives are concerned.

From the 1880s to the present day the rate of suicide has oscillated in a narrow range of ten to fifteen cases per 100 000 population. In the period under review, 1880 to 1899, the rate started around ten, dipped slightly into high single figures for a year or two and then rose to gradually to finish at 12.3 in 1899, the slight upward trend being attributable to the depression and droughts of the 1890s and consequent loss of socio-economic status on the part of many people. (Alarmed at the rise of suicides in 1892, the Bench of Magistrates in Richmond, Victoria resolved to send a case for trial before the higher Courts in order to determine whether attempted suicide was a felony; this plan was thwarted by the death of the accused a few weeks later of unrelated causes, leaving Holroyd J. to raise the same

[14] The same problem was encountered even by two authors with a book-length manuscript and a computer to help process the data : Malcolm MacDonald/Terence Murphy, *Sleepless Souls : Suicide in Early Modern England* (Clarendon, Oxford 1990) p. vi. The need to look beyond the law in the books to observe the law as actually practised is also emphasised by Gwen Seabourne/Alice Seabourne, "The Law on Suicide in Mediaeval England" (2000) 21 Jo Leg Hist 21, 21f. The history of suicide in the law is a much under-researched area (Roisin Healy, "Suicide in Early Modern and Modern Europe" (2006) 49 Hist Jo 903, 903f), which newspaper digitisation has helped to open up somewhat. There is however a general legal history in Glanville Williams, *The Sanctity of Life and the Criminal Law* (Faber & Faber, London 1952), ch. 7.

question almost three years later.)[15] The lowest suicide rate was recorded in 1882, with 8.7, and the highest in 1897, with 13.5 (the only time in the period in question when the rate reached the teens).[16] A perusal of the methods employed 130 years ago reveals nothing that surprises the reader by its presence, absence or frequency.

The state of psychiatry and psychology, however, was rather different from what it is today. Indeed, it was only in the late eighteenth century that the disciplines had begun to emerge at all.[17] Some impetus was given to the early development of treatments for mental disturbances by the mental difficulties of King George III, and by the end of the nineteenth century a vast change in society's response to mental illness had occurred : asylums became the officially approved response and processes of professionalisation and medicalisation had occurred.[18] I know of no studies or statistics on the topic, but it is probably true despite those developments that the availability of professional help for mental health problems was not as extensive as it is today, owing to barriers such as difficulties in transport, lower standards of living and a lower level of awareness even among trained medical staff, and certainly the media of the day did not carry awareness-raising campaign material comparable to today's.

Despite that, an important change had been effected by the middle of the nineteenth century : there was now no-one who seriously regarded suicide as an act procured 'by the instigation of the Devil'[19] or other malevolent spirits, such as had still been the case while the Enlightenment was busily doing its work on elite and popular opinion. Rather, secular psychology had progressed sufficiently to convince all and sundry, high and low that suicide was not due to evil supernatural influence but had causes that were susceptible of human intervention and cure.[20] An *avant garde* man of letters of the

[15] "Age", 28 November 1892, p. 6; "Herald" (Melbourne), 15 December 1892, p. 1; 27 December 1892, p. 1; "Argus", 28 December 1892, p. 6.
[16] Australian Bureau of Statistics, *Suicides, Australia, 1961 – 1981 : Including Historical Series 1881 – 1981* (A.B.S., Canberra 1983), pp. 2, 9; Knibbs, "Suicide in Australia : A Statistical Analysis of the Facts" (1911) 45 Jo & Proc Royal Soc N.S.W. 225, 226, 228; internet searches for the period since 1981.
[17] Edward Shorter, *A History of Psychiatry* (John Wiley & Sons, New York 1997), pp. 8f, 17.
[18] Andrew Scull, "The Social History of Psychiatry in the Victorian Era" in *id.* (ed.), *Madhouses, Mad-Doctors and Madmen : the Social History of Psychiatry in the Victorian Era* (Athlone, London 1981), pp. 6-8.
[19] *Hales* v. *Pettit* (1563) 1 Plow 253, 261; 75 ER 387, 400.
[20] Olive Anderson, "Prevention of Suicide and Parasuicide : What Can We Learn from History?" (1989) 82 Jo Royal Soc Medicine 640, 641; Henry Romilly Fedden, *Suicide : A Social and Historical Study* (Peter Davies, London 1938), pp. 247f; Peter Gay, *The Cultivation of Hatred* (W.W. Norton, New York 1993), pp. 207-212; Georgina Laragy, "'A Peculiar Species of Felony' : Suicide, Medicine and the Law in Victorian Britain and Ireland" (2013) 46 Jo Soc Hist 732; MacDonald/Murphy, above n 14 at 214; Wilfrid Prest, *Albion Ascendant : English His-*

day named William Archer, while denying (as at this point many did) the right of society to punish suicide, went even further and caused much outrage and discussion in 1893 by proposing a right to suicide and state-run euthanasia facilities.[21] His time was not yet. But those who had committed or attempted suicide were thus not seen as in essence necessarily evil people deserving punishment, nor yet people under the influence of malign spirits, but rather, as a rule, unfortunate in some way as well as perhaps weak in failing to stand up to the stresses and strains of life. The forms of the law, however, did not change at once; controversies about what changes could be made to them were accordingly neatly side-stepped; what changed, rather, was how the law was applied in that new intellectual setting.[22]

b. The crime of attempted suicide

It is generally held that attempted suicide was recognised as a crime rather later than one might perhaps expect – *R* v. *Doody*,[23] a case from 1854, is the case often cited,[24] although two years earlier at the Sussex Summer Assizes none other than Sir John Jervis L.C.J. held a trial for the crime and clearly believed it to exist already then.[25] There is also a report of two trials in 1841, although it is not clear that attempted suicide was actually the formal charge in those cases as distinct from the act that brought the defendant to Court on another longer-established criminal charge.[26] Here is a task for another day : determining how exactly this new crime emerged around the middle of the nineteenth century. Nevertheless, the civil law had for much longer contained special rules applicable to those

tory, 1660 – 1815 (O.U.P., 1998), p. 145; George Rosen, "History in the Study of Suicide" (1971) 1 Psych Medicine 267, 281f (but see at 272f, indicating that a more "modern" explanation also sometimes occurred to mediaeval people; we must be careful not to infantilise or over-simplify the past). Note, however, the caveats entered by Seabourne/Seabourne, above n 14 at 34, although about a yet earlier period; by Healy, above n 14 at 907f, which I have tried to reflect in my paragraph above; and by Kästner, "Saving Self-Murderers : Lifesaving Programmes and the Treatment of Suicides in Late Eighteenth-Century Europe" (2013) 46 Jo Soc Hist 633, 645. There is also a general overview of nineteenth-century literature on suicide in Barbara Gates, *Victorian Suicide : Mad Crimes and Sad Histories* (Princeton U.P., 1988), chh. 1, 8.

[21] See, for example, "Geelong Advertiser", 14 October 1893, p. 1. See also below, fn 82.

[22] MacDonald/Murphy, above n 14 at 344f.

[23] (1854) 6 Cox CC 463; 2 LT (O.S.) 12.

[24] *E.g.* Barry J., "Suicide and the Law" (1965) 5 MULR 1, 5.

[25] *R* v. *Moore* (1852) 3 C & K 319; 175 ER 571. This case was, however, discovered by Glanville Williams : *Criminal Law : The General Part* (2nd ed., Stevens & Sons, London 1961), p. 569 fn 3.

[26] Gates, above n 14 at 51f; Olive Anderson, *Suicide in Victorian and Edwardian England* (Clarendon, Oxford 1987), p. 291. Even a reference to the reports in the Times, 23 October 1841, p. 7 and 3 November 1841, p. 7, does not finally clear that point up, but the latter report does suggest that attempted suicide had not yet established itself as an independent crime, as the defendant was committed to the treadmill 'as a rogue and vagabond'.

who succeeded at suicide, most obviously provisions for forfeiture as after a felony (the term used for suicide was *felo de se*, "a felon about oneself")[27] along with special rules requiring the ignominious burial of the body. Characteristically, the law also permitted these consequences to be evaded by a declaration that the suicidal person had been insane and therefore not criminally responsible at the time of the deed, and by the nineteenth century this state of affairs was notoriously found to have been so by coroners' juries on many more occasions than strictly warranted as a means of showing kindness to the suicide's relations. Yet people in the past were no more of one mind on any question, including this one, than are people on live questions of our own time. Thus Blackstone, for example, in his *Commentaries* deprecates the practice of coroners' juries acting as if 'the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all',[28] and there were plenty of people in the nineteenth century – among whom were a few of Her Majesty's Judges – who still supported a hard line against suicide.[29] In 1897, a young priest named Herbert Hensley Henson – writing (fittingly enough) from All Souls' Oxford, destined for greatness in the Church and by no means a narrow-minded bigot, although obviously committed to a religious view of the question – deprecated the fact that suicide was regarded sympathetically and with 'extreme laxity' by the Courts, which encouraged suicide and was to be ascribed in part to 'that almost extravagant sympathy with wretchedness, as such, which characterises an age at once selfish and sentimental'[30] (an example of victimhood culture in a previous age?). He called on Magistrates to punish for attempted suicide properly.[31] Reformers gradually won the day, however, over the nineteenth century : in New South Wales, for example, the *Law of* Felo-de-se *Amendment Act* 1862 (N.S.W.) s 1 abolished all the consequences of the verdict of a finding of *felo de se*,[32] and then 39 Vic. No. 22 (1876) (N.S.W.) s 1 abolished the verdict itself.[33] The compromise reached by the end of the nineteenth century, under which at-

[27] But see Williams, above n 14 at 235f.
[28] Prest/Paley (eds.), *Oxford Edition of Blackstone : Commentaries on the Laws of England* Book IV : Of Public Wrongs (O.U.P., 2016), p. 125.
[29] In addition to the writer about to be quoted in the text, see Anderson, above n 26 at 264, 306; J.W. Horsley, *Jottings from Jail : Notes and Papers on Prison Matters* (T. Fisher Unwin, London 1887), pp. 46, 258f; J.W. Horsley, "Suicide" in Nathaniel Keymer (ed.), *Workers together with God : a Series of Papers on some of the Church's Works by some of the Church's Workers* (3rd ed., A.R. Mowbray, Oxford 1898), pp. 305f (Horsley was a prison chaplain who had ministered to countless would-be suicides).
[30] Henson, "Suicide" in *Oxford House Papers : a Series of Papers Written by Members of the University of Oxford* (Longmans, Green & Co., London 1897), p. 67.
[31] *Ibid.* at 75.
[32] Other than those already abolished by the received English law : *Burial of Suicide Act* 1823 (U.K.). In Victoria legislation was delayed and outrage occasioned when a coroner ordered burials of suicides under the old practice as late as 1896; the *Coroners Act* 1896 (Vic.) was passed to remedy the situation : Victorian Parliamentary Debates, Legislative Council, 19 August 1896, pp. 1296f; 25 August 1896, pp. 1411-1413; 13 October 1896, pp. 2482-2486; Legislative Assembly, 14 October 1896, p. 2541; 4 November 1896, pp. 3016-3018.
[33] This step, the abolition of the label, was taken in 1953 in England : Williams, above n 14 at 236f.

tempted suicide remained a crime but was punished lightly, commanded general support and signalled that the community's disapproval of the act (any serious attempt at abolition would probably have faced objections on the ground of diluting this message) alongside its sympathy for those who did it.

Those whose attempts had failed did not come to the criminal law's notice for that crime until the mid-nineteenth century, thereby largely excusing what would seem otherwise to be quite extraordinary ignorance on the part of Holroyd J. in suggesting in 1895 that attempted suicide might be a felony punishable with death. When the law finally decided on the question, the reasoning was simple : suicide was a felony, and at common law any attempt to commit a felony was a misdemeanour, and therefore attempted suicide was a misdemeanour. Several broader historical factors may account for this late development. On the practical plane, the formation of a professional police force in England in 1829 greatly increased, particularly in towns as opposed to the broad countryside, the arrest rate of those found breaching the peace by attempting suicide.[34] As breaching the peace in itself is not a crime, thought had to be devoted to the question whether attempted suicide was. Paradoxically, too, the criminalisation of attempted suicide supported the growing movement to remove the penalties, such as forfeiture, endured by the families of those who had succeeded : it could now be argued that those miscreants who were amenable to earthly punishment – or more accurately, as we shall see, assistance and rehabilitation in most cases – would receive it, and accordingly there was no need to punish families as proxies for the successful dead.[35] From this perspective it is only apparently a backwards step to criminalise the attempt.

A remarkable fact about the crime of attempted suicide is how little its elements and nature were ever elaborated by case law. In New South Wales there is a brief record of one Judge directing the jury in 1954, the year which could have been celebrated as the centenary of the crime's existence, that specific intent was necessary;[36] as, however, the main charge against the accused was attempting to kill his child alongside himself and that was still a capital offence, little occasion arose to elaborate on this point in regard to attempted suicide. On the other hand, in England in 1832 a woman was ruled *felo*

[34] Anderson, above n 26 at 283-290; MacDonald/Murphy, above n 14 at 350 (stating that arrests for attempted suicide in the eighteenth century had been found in Court records; the text provides one possible explanation).
[35] MacDonald/Murphy, above n 14 at 351.
[36] *R* v. *Basto* (1954) 91 CLR 628, 635. This appears to be the last case in Australian law reports on the topic – indeed, almost the only reported case. A later one from England, just before the abolition of the crime there (*Suicide Act* 1961 (U.K.) s 1), is *R* v. *Bennett;* ex parte *Radburn* [1960] 1 WLR 102, from which nothing interesting for present purposes emerges.

de se even though she had not intended to kill herself but rather to procure an abortion, and the man who had supplied the poison to her was declared an accessory before the fact to her self-murder.[37] An English case from 1912 appears to establish that intoxication, which features all too often in reports of attempted suicides, was no bar to a verdict of attempted suicide as long as the accused still was capable of intending, and did intend suicide, but other possible states of mind such as recklessness were not considered.[38] Successive editions of *Archbold's Pleading and Evidence in Criminal Cases* contained nothing beyond merely procedural information about the Court of trial.[39]

One might have expected some case law about whether attempts falling below a certain level of seriousness would be punishable and the precise nature of the intention or recklessness (foresight of probability/possibility) that would be necessary to constitute the offence.[40] It may seem odd to ask whether recklessness would suffice for a crime consisting in an attempt, but in this case the completed act is either not a crime at all[41] or at least not criminally punishable, and therefore there would be an argument that attempted suicide is not truly the inchoate form of a completed crime and that the usual rule should therefore not apply. In the nature of things, this is a particularly live question in relation to attempts at suicide which require the complete overcoming of the natural instinct for self-preservation, involve the same person as both victim and perpetrator and may be undertaken with still some hope of survival : does a person show the necessary *mens rea* for the crime if he realises, for example, that discovery is probable or possible and perhaps even hopes for and expects it but still intends the acts necessary to endanger life, or if he does an act in despair not caring whether his life might be ended by it and foreseeing some level of risk that it would be – perhaps intending to do everything necessary to leave his survival up to God or fate?[42] If that is recklessness, does it or any other variety of it suffice for a conviction and if so to what standard of recklessness? None of these questions ever came up for debate, and the reason why this dog did not bark is that the crime was not

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[37] *R* v. *Russell* (1832) 1 Mood 356, 367; 168 ER 1302, 1306.

[38] *R* v. *Crisp* (1912) 7 Cr App R 173. See also *Doody*, (1854) 6 Cox CC 463; 2 LT (O.S.) 12; *R* v. *Moore* (1852) 3 C & K 319; 175 ER 571; *D.P.P.* v. *Beard* [1920] AC 479, 486, 489, 504; Williams, above n 25 at 569.

[39] For example, the 27th ed. of 1927 (Sweet & Maxwell, London) mentions the crime only briefly at pp. 916 and 1405; this edition is representative of the others looked at by the present author.

[40] Onyemelukwe, above n 11 at 238, who also raises the question whether an omission would be sufficient. What about hunger strikers? See, for a similar case, Williams, above n 25 at 733f.

[41] Thus, for example, as we have just seen 39 Vic. No. 22 (1876) (N.S.W.) s 1 abolished the verdict of *felo de se* altogether and presumably also the crime of suicide itself. It is odd that no-one in New South Wales thought of arguing that as the main offence had been abolished, the attempt had fallen with it. This supports the idea that the attempt was really an independent crime separate from the completed act which the criminal law could never punish.

[42] *Cf.* Williams, above n 25 at 621. A rather severe writer put it more bluntly in 1900 : 'It is an undoubted fact that such attempts are frequently mere shams, the only object of which is to attract sympathy or notoriety' : Gurnhill, *The Morals of Suicide* (Longmans, Green & Co, London 1900), pp. 207f (emphasis in original).

of the orthodox type; only rarely, as we shall see, was the accused actually punished, and so the occasion never arose to elaborate its mental element seriously.

Equally unregulated was the level of punishment applicable – although *pace* Holroyd J. it was clearly not death, which was reserved for felonies. At common law the punishment for a misdemeanour – which attempted suicide was, being an attempt to commit a felony – was imprisonment, with no fixed upper limit, a fine or recognisances (as Holroyd J. indeed discovered on looking at further authorities). It is again because nothing anywhere near the maximum punishment was ever inflicted that no occasion arose to define the contours of punishment for attempted suicide in any of the colonies either at common law or by statute.[43] There also seems to have been little need to regulate procedural questions; the only exception is s 18 of the *Criminal Law and Evidence Amendment Act* 1891 (N.S.W.), which near the middle of our period expressly authorised the practice already current in the other colonies of dealing with cases of attempted suicide, along with some other offences, summarily before the Magistrates rather than committing the accused to the higher Courts. This change was made, said Simpson A.-G. Q.C., in order to benefit the 'poor unfortunate man, almost in a state of insanity',[44] who had attempted to take his own life and who should not have to wait in prison for months on end for the higher Courts. In at least one instance in late 1891 a case was adjourned specifically so that it could be dealt with summarily under this Act – by imprisonment until the rising of the Court, as it turned out – rather than by the higher Courts.[45]

c. English practice

The English practice is important for understanding Australian practice at the time, for it was what those who administered Australian law were largely familiar with[46] and saw as a model for themselves.

[43] It was otherwise under the codes, of course, which began to appear just after the end of our period. Under s 312 of the original Griffith Code, the penalty for attempted suicide in Queensland was fixed at one year's imprisonment with hard labour.
[44] New South Wales Parliamentary Debates, Legislative Council, 5 August 1891, pp. 606f.
[45] "Sydney Morning Herald", 19 December 1891, p. 13.
[46] Of course there were also Scots and Irish around too. There appears to be no information about what expectations the latter's home country might have created in them on the questions in issue here. In Scotland attempted suicide was not a crime at all (Williams, above n 14 at 248f, 270; but *cf.* Norman St John-Stevas, *Life, Death and the Law* (Eyre & Spottiswoode, London 1961), p. 257), and therefore Scots would have been blank slates on this point with no particular expectations of how the law would deal with such cases based on the practice in their home.

In the field of attempted suicide, the usual weaponry of the criminal law – as wielded by Judges, prison officers, even local Magistrates – was not central : rather, the police, examining Magistrates, chaplains and medical officers were the main players. Taken as a whole, the Magistrates in England were shrewd but kind : they directed their energies to understanding people and the circumstances in which they lived.[47] Most of those who appeared before the Magistrates were not committed for trial before Quarter Sessions or the Assizes; those more likely to be committed were men and those who had previously attempted suicide or had criminal records. Rather, those brought before the local Courts were often remanded for a week or two as a means of ensuring that they did not repeat their attempts and to enable them to receive visits from the chaplain and if necessary the surgeon (which led to some criticism of Magistrates as being too soft);[48] sometimes Magistrates even received donations from members of the public intended for their unfortunate charges after reports of their plight had appeared in newspapers.[49] Grand jurors also played their part, and some grand juries refused to send cases for trial even when the Magistrates had committed.[50]

By the end of the nineteenth century it was rare indeed for something that could, with a straight face, be called a penalty to be inflicted upon those who had attempted suicide.[51] In 1885 the Deputy Coroner for Central Middlesex, a man with very unusual extra-curricular interests as a co-founder of the occult Hermetic Order of the Golden Dawn, reported broadly but accurately that :

> When the police hear of an attempt at suicide, the culprit is taken in charge by them; if seriously injured the patient is watched in hospital by a police officer. It is customary to charge the offender before the magistrates as soon as practicable; in such a case it is more usual to bind over the prisoner to "keep the peace" than it is to send the case for trial; if there be any evidence of insanity, the prisoner is examined by the police surgeon and another medical man; and if found to be insane is certified as such, and confined in an asylum.[52]

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[47] Anderson, above n 26 at 308f. There had been a tougher approach in sentencing during the conservative reaction of the 1840s, yet even there the focus was not on punishment but on prevention of suicide : Gates, above n 26 at 51f.

[48] Writing of a later time, Williams, above n 14 at 251 indicates that the period might rather be some weeks.

[49] Anderson, above n 26 at 292-300.

[50] Anderson, above n 26 at 302.

[51] S.A.K. Strahan, *Suicide and Insanity : a Physiological and Sociological Study* (Swan, Sonnenschein & Co., London 1892), pp. 200-202.

[52] Wynn Westcott, *Suicide : Its History, Literature, Jurisprudence, Causation and Prevention* (H.K. Lewis, London 1885), pp. 159f.

Only in cases of special need, such as with repeated attempts or lack of family or other community support, was any serious sentence passed, and then only for the protection of the accused.[53] At the start of the twentieth century the police themselves started getting into the business of dispensing mercy to those tired of life and did not even initiate prosecutions unless there was some special reason to do so.[54]

[53] For example, in *R* v. *Mann* [1914] 2 KB 107 in which the penalty was six months' imprisonment with hard labour, but a reference to the report of the case in the "Manchester Guardian", 10 February 1914, p. 5, reveals that the hard labour was in fact cancelled, which the authorised report fails to state. There is much levity in the Court hearing for a reason that seems difficult to grasp – we are not told whether the appellant was present – and at the end Lord Reading L.C.J. says that the term of imprisonment without hard labour 'would meet the case' – why, his Lordship does not say – and the hard labour was deleted from the sentence. The mystery is finally solved by referring to yet another report of the case, that in (1914) 10 Cr App R 31, 33, which indicates that it was the accused's third time in prison for attempted suicide and that he was in need of 'restraint and discipline'.
R v. *Saunders* (1913) 9 Cr App R 119 is very briefly reported, but it is plain that the six-month sentence was intended solely to ensure that there was no repeat of the act, the conditions of imprisonment were changed to make it easier for the prisoner to see his wife and the Home Secretary was advised by the Judges to release him even before the end of the sentence if the danger had passed. The early volumes of the "Criminal Appeal Reports" contain one or two other cases on sentencing for attempted suicide (*e.g. R* v. *Wilson* (1913) 9 Cr App R 32) but nothing that disturbs the picture painted here.
In *R* v. *French* (1955) 39 Cr App R 192 even Lord Goddard L.C.J. was shocked by an 'absurd' sentence of two years and substituted one month given that attempted suicide was 'not a very serious crime' (at 194) while also remarking upon the reduction in prosecutions in the higher Courts for attempted suicide since he was a young man.

[54] Sir Leonard Dunning, "Discretion in Prosecution" (1928) 1 Police Jo 39, 46; St John-Stevas, above n 46 at 239f; Lilian Wyles, *A Woman at Scotland Yard : Reflections on the Struggles and Achievements of Thirty Years in the Metropolitan Police* (Faber & Faber, London 1952), p. 81. A few statistics from the 1930s may be found in Fedden, above n 20 at 262f, and there are others in St John-Stevas, above n 46 at 240f; Williams, above n 14 at 236, 251.
The police in Victoria took the same attitude when Barry J. wrote on the topic in the mid-1950s : above n 24 at 15; and see at 8 in respect of Queensland.

3. Australian experience with the crime of attempted suicide, 1880 – 1899

a. Stories and statistics

In the period in question, by far the best set of published statistics is that of Victoria.[55] In our last year, 1899, we learn, for example, that exactly four cases of attempted suicide were tried before the higher Courts, and of those one of the accused was acquitted.[56] This was one John James Goldsmith, who had been committed for trial before the higher Courts after pleading guilty, and who was committed for trial on the ground that it was unsafe for him to be at large, but then curiously allowed bail because he had already been in prison for a week.[57] Some evidence existed that Goldsmith was under the influence of alcohol and had been expelled from the marital home in favour of another man whom he attacked upon finding him in his own house (although he was found not guilty of that offence also).[58] Despite the guilty plea below, in the Supreme Court of Victoria two witnesses gave evidence that the alleged suicide attempt was not serious, and an up-and-coming young barrister named George Maxwell, later to be declared by Sir Robert Menzies Q.C. 'the greatest criminal advocate I ever heard' and possessed of a remarkable gift for 'tak[ing] hold of some apparent irrelevancy and elevat[ing] it into a crucial fact',[59] had the case laughed out of Court by having one witness state that Goldsmith had threatened to kill himself first and after that his family. Goldsmith was acquitted by direction of the Judge.[60] One charge of attempted suicide was withdrawn : Michael John Costelloe,[61] a school headmaster, was found guilty of a sexual offence against a pupil whereupon the Crown – represented by Dr John Quick of Federation fame, who was prosecuting counsel at the time – entered a *nolle prosequi*

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[55] The reason will be apparent from the biography of H.H. Hayter in the *Australian Dictionary of Biography*. See also Peter Groenewegen/Bruce McFarlane, *A History of Australian Economic Thought* (Taylor & Francis, London 2010), ch. 5; Geoffrey Serle, "The Victorian Government's Campaign for Federation 1883 – 1889" in Jill Roe (ed.), *Social Policy in Australia : Some Perspectives 1901 – 1975* (Cassell Australia, Stanmore 1976), p. 46 fn *, where the reference to comparative suicide statistics is presumably a reference to statistics about the completed act.

[56] *Statistical Register of the Colony of Victoria for 1899*, Victorian Parliamentary Paper 5/1900-1901, pp. 12, 28.

[57] "Coburg Leader", 18 February 1899, p. 1.

[58] "Age", 15 February 1899, p. 9; "Argus", 22 February 1899, p. 3. There are further newspaper reports around this time relating to this domestic drama which I have read for background but do not cite.

[59] *The Measure of the Years* (Cassell Australia, North Melbourne 1970), pp. 254, 255. See also Sir Arthur Dean, *A Multitude of Counsellors : A History of the Bar of Victoria* (F.W. Cheshire, Melbourne 1968), p. 228.

[60] VPRS 30/P0/1171/97; "Herald", 23 March 1899, p. 4; "Age", 24 March 1899, p. 6; "Argus", 24 March 1899, p. 7. A funeral notice for a man by this name appeared in the "Age", 31 August 1936, p. 1.

[61] Sometimes spelt in what today is the more familiar form, Costello. This is the form adopted in the prosecution files (below, fn 62), but I have chosen the form in his death notice : "Age", 11 June 1923, p. 1.

on the charge of attempted suicide,[62] no doubt because no serious punishment could be expected for it whereas the punishment for the sexual offence would be severe.

There were also two convictions in the higher Courts.[63] One was of a cab-driver named William Henry Burrows, who was bound over to keep the peace for twelve months in the sum of £10 having cut his throat in the City Baths in despair, he said, of being able to keep away from drink – but then with obvious deliberation drew the caretaker's attention to himself by making knocking sounds[64] (the sort of act, indeed, that might have raised questions about his possession of the mental element of the crime). His attempt two years later to drown himself in the Yarra was successful.[65]

The other conviction was of Herbert Alexander Shattock, a young man of twenty-one years whose love for a young lady of seventeen years was not returned and who had taken to drink and then consumed enough arsenic to kill dozens of men; he was saved only by prompt medical attention. It is not entirely clear why he also could not be dealt with in the lower Courts, but one possible reason is that the committing Justices knew that he would receive a trial by the end of the week in the higher Courts, for the sessions were about to begin; bail was allowed.[66] On his appearance before the equivalent of today's county/district court, he was represented by the Hon. Alfred Deakin. He was convicted and released on the recognisances of himself and his father, an accountant; a model of the addresses to would-be suicides by Judges was delivered by Acting Judge W.E. Johnston, a Judge who after his permanent appointment to the Bench shortly afterwards became known for his kindness and tempering of justice with mercy[67] :

> The difficulty your case presents to the administrators of justice is very serious indeed. Many people think that it is impossible for courts of justice to deal logically with a man who, like

[62] There is a hand-written note on the front of the case file VPRS 30/P0/1187/355 reading 'Part heard and *nolle prosequi* entered/John Quick' (this file also contains the suicide note); "Bendigo Independent", 10 August 1899, p. 3; the sentence for the sexual offence was five years : VPRS 30/P0/1187/354.
[63] *Statistical Register*, above n 56 at 21. This case explains the difference between four committals shown at p. 28 and three at p. 18; see the note at the top of p. 18.
[64] VPRS 30/P0/1185/332; "Age", 12 July 1899, p. 7.
[65] VPRS 24/P0/737/1901/853 (contains suicide note and statement by landlady stating no excessive drinking); "Herald", 15 July 1901, p. 1; "Argus", 16 July 1901, p. 7 (open verdict but true position clear enough from the reports, the suicide note and his history).
[66] "Age", 29 August 1899, p. 5.
[67] A.L. Read, *Short Biographies of County Court Judges who have Died since 1852*, State Library of Victoria MS 454/7, under the Judge's name (no pagination).

> you, has endeavoured to take away that which in one sense belongs to him – his own life – but in which, in another sense, the rest of the community is interested, both from their material advantage and by way of example : a life too, as in your case, in which many no doubt near and dear took a much greater interest than you yourself. I am not mentioning these difficulties in order to diminish, in any way, the seriousness of what you have done, either from the legal, the moral, or the religious point of view. I am only interested in the difficulties which the arm of the law has in striking at the offence which you have committed. Whatever punishment it may please the Almighty to inflict upon those who violate 'His canon 'gainst self-slaughter' any punishment that I can administer can be nothing like so severe as that which you proposed to administer to yourself. All I can do is to speak to you in such a way that you and others shall realise the position in which you now stand. There are certain moral punishments attached to your act, and for which you will have to suffer, but I entreat you to live them down. For instance it is deplorable that you, who had so much fine feeling as to do a thing of this kind on account of your love for a woman, should have done a distinctly unmanly thing in the doing, and perhaps, the most serious part of your suffering will be in meeting that obloquy, but you can live it down if you only make an effort. You are a young man, and the cause of your trouble is similar to that which millions of people have had to suffer and are able to get over. Without disparaging the object of your affection, I would remind you that she is not the only woman in the world, and there is no reason why a young virile man like yourself should not overcome all your difficulties and become a well-ordered member of society. One thing I can do to anchor you or brace you up to your responsibilities is to allow you out on your own recognisance of £25, and your father in a like amount. If you behave yourself hereafter you will never require to appear in these courts again.[68]

Shattock took this advice by marrying another woman in January 1903;[69] the marriage lasted until his death in 1949 and produced five children, and he lived to see his great-grandchildren.[70]

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[68] "Argus", 2 September 1899, p. 14. The internal quotation is from *Hamlet*, Act I Scene 2. There is also a prosecution file (VPRS 30/P0/1191/403) but it adds nothing of importance for present purposes beyond the name of the young woman, Marion Balfour Smith (later Reaby).

[69] "Age", 7 March 1903, p. 5. Nevertheless, "Victoria Police Gazette", 24 August 1905, p. 326, contains a notice that Shattock is missing and '[f]ears are held for his safety'. Whatever the problem was, it was clearly overcome.

[70] "Age", 15 November 1949, p. 2. Shattock's ashes are kept in a memorial wall in Fawkner Memorial Park alongside his wife's (who died in 1972) only a few steps from the western platform of the Fawkner railway station.

The remaining Victorian cases from 1899 – forty-two men and thirty-one women – were all discharged before Magistrates.[71] Reference to statistical returns from Victoria for other years in the 1880s and 1890s indicates that 1899 was a fairly typical year.

In the same year in New South Wales, 1899 – which consultation with reports for other years, as far as they are available, suggests is again typical – the picture is quite similar. One person was charged and convicted before the higher Courts of attempted suicide, although the sentence was suspended as it was declared a minor offence within ss 2 and 3 of the *First Offenders Probation Act* 1894 (N.S.W.); ninety-five people (sixty-one men and thirty-four women) were charged before Magistrates, of whom seventy-five were convicted – but many, as we shall see, were in effect discharged without penalty, meaning that the position was not so very different from that in Victoria. In nineteen cases the charge was withdrawn, made the subject of a formal discharge order or otherwise abandoned, and there was the solitary case of committal to a higher Court to make up the total.[72] That person, Ernest William Weaver, was originally sentenced to the surprisingly long term of six months' hard labour, but was released under the Act on finding three sureties, one his own.[73] Ernest Weaver was a printer by trade who had attempted suicide under the influence of drink and unemployment;[74] it is again not clear why he, alone of all would-be suicides in New South Wales in 1899 who came to the law's notice, was not dealt with by Magistrates, as there was, unfortunately, nothing unusual about his predicament and he was not remanded in custody pending trial as might have been done if he were still considered a danger to himself or others. On releasing him Docker D.C.J. urged him to give up the bottle for the sake of his family of six.[75]

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[71] *Statistical Register*, above n 56 at 28 (see also at 18).
[72] *New South Wales Statistical Register for 1899* (Government Printer, Sydney 1900), pp. 681, 699, 701.
[73] New South Wales Government Gazette, 3 January 1900, p. 8.
[74] "Daily Telegraph", 7 November 1899, p. 6; 15 November 1899, p. 8.
[75] "Newcastle Morning Herald and Miners' Advocate", 7 December 1899, p. 3. His death certificate (New South Wales Registry of Births, Deaths and Marriages 2374/1904) states the cause of his death on 27 March 1904 in hospital as heart failure and cirrhosis of the kidneys; a death notice is in "Newcastle Morning Herald and Miners' Advocate", 26 November 1904, p. 4. On the same page is another notice placed by his parents commemorating the death of two of his brothers years earlier while fishing. The father's obituary is in "Newcastle Sun", 26 August 1920, p. 5, which mentions that the death of two other sons while fishing had affected his health, and a funeral notice is in "Newcastle Morning Herald and Miners' Advocate", 27 August 1920, p. 6, which indicates that he had eight living children.

Statistics are less extensive in the smaller colonies but again suggest, as far as they go, the considerable similarity that we should expect in colonies of similar ethnic composition and culture. In Queensland two trials before the Supreme Court of Queensland are recorded, one of which took place in Brisbane and the other in Rockhampton;[76] there appear to be no statistics on this point for the lower Courts. In the Brisbane case Griffith C.J. sentenced Eustace Winteknecht to be imprisoned until the rising of the Court, although he had been on remand and accordingly had served a least a day or two of imprisonment.[77] In Rockhampton, Robert Galbraith was sentenced to a minute's imprisonment, although again he had been in custody – for about a month, it would seem[78] – pending his appearance before the Supreme Court of Queensland.[79]

In the Magistrates' Courts of South Australia in 1899, eleven cases of attempted suicide were heard; four were committed to the Supreme Court of South Australia, four dismissed and three dealt with summarily.[80] Again no firm criterion for dividing would-be suicides between those suitable for summary judgment and those in need of committal is evident, and, although the sample size is quite small, there seems to be a high proportion of committals. Nevertheless they were also dealt with kindly.

> Annie Ohlstrom, a respectable-looking young woman of 19, pleaded guilty to having attempted to commit suicide by throwing herself into the River Torrens, at Adelaide, on January 17. The young woman's father, who lives at Yorke's Peninsula, was called, and [Boucaut J.] asked him if he knew what caused his daughter to seek her own life, and he replied in the negative. — His Honour, to the girl – Do you think I am safe in letting you go? How do I know that you will not go down to the river and try to do this thing again? — The defendant, in an almost inaudible tone of voice, said she would not make another attempt. She was then bound over to come up for sentence when called upon, and left the Court with her father.[81]

[76] *Statistics of the Colony of Queensland for the Year 1899* (Government Printer, Brisbane 1900), p. 303.
[77] "Telegraph" (Brisbane), 29 May 1899, p. 3; "Brisbane Courier", 30 May 1899, p. 7.
[78] "Western Champion and General Advertiser for the Central-Western Districts", 22 August 1899, p. 9.
[79] "Morning Bulletin" (Rockhampton), 13 September 1899, p. 3.
[80] *South Australia : Statistical Register 1899* (Government Printer, Adelaide 1900), Part V pp. 14, 17.
[81] "South Australian Register", 21 February 1899, p. 3.

The exception was William Owen Lewis, sentenced by Way C.J. to six months because it was his second attempt – in this case, made when he was depressed owing to the death of his wife.[82] Already in his late sixties, he died only eighteen months later without any suggestion of suicide.[83] On the other hand, Alfred Albert Wyman, an unemployed labourer but described as an 'intelligent-looking young man' of twenty-three years – who had returned home to find his wife misbehaving with another man and her urging him to do away with himself – was let off by Way C.J. with a discharge on his own recognisances even though it was his second attempt; his Honour advised him to obtain a divorce or judicial separation rather than commit a 'cowardly and unmanly act' and warned him of a severe sentence if he was encountered again attempting suicide.[84] He went on to serve in the Boer War[85] and returned to carry on the occupation of newsagent, but died only a few years later in 1907 owing to a genuine accident aggravated by surgical complications. He had been struck while cycling by a boy of thirteen years who was driving a cart,[86] and went on to make more legal history posthumously by featuring in one of the first coroner's inquests held without a jury under the *Coroners Act Further Amendment Act* 1907 (S.A.).[87]

The fourth case from 1899, that of Lottie McMahon, was not heard until the following year, and she was acquitted by the jury after swearing that she did not intend to kill herself.[88] She tried again the following year after breaking up with the man who had treated her as a wife since she was thirteen years old, and was again released on exciting the sympathy of the Magistrates and again denying any intent to kill herself but promising to find refuge with her sister in Murray Bridge.[89] Her ultimate fate is not known to me.

In Western Australia the statistics do not allow us to say any more than that no-one was imprisoned in 1899 for attempted suicide,[90] and in Tasmania two cases of attempted suicide were dealt with by

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[82] "South Australian Register", 5 December 1899, p. 3. See also "Areas Express and Farmers' Journal" (Gladstone), 22 December 1899, p. 4, reprinting an article from a now lost edition of a newspaper commenting on this case and also advocating Archer-style suicide facilities (above, fn 21), although it is hard to know how serious this is given the references to Dreyfus and the Kaiser that follow.
[83] "Register", 17 July 1901, p. 3.
[84] "Advertiser", 6 April 1899, p. 3.
[85] "Register", 5 October 1908, p. 7. Judging on the title of South Australian Archives, GRG 34/72/00000/8, Wyman on his return initially worked as an attendant in the Parkside Lunatic Asylum.
[86] "Advertiser", 27 November 1907, p. 7; "Register", 27 November 1907, p. 3.
[87] "Register", 27 November 1907, p. 6.
[88] "South Australian Register", 21 February 1900, p. 3.
[89] "Express and Telegraph", 25 April 1901, p. 2; "Register", 25 April 1901, p. 4.
[90] *Statistical Returns for the Year 1899 and Previous Years* (Government Printer, Perth 1901), Part VIII pp. 42f.

Magistrates by summary conviction or bail (rather than committal for trial or, on the other hand, dismissal).[91]

b. Typical cases of mercy

This section explores some other notable cases and causes of mercy for attempted suicides in the 1880s and 1890s. It should also be mentioned that so far – and in this section it will be the same – we have not come across any evidence that one's social class mattered greatly in determining the outcome of the case; unemployed labourers, accountant's sons and printers all received the same merciful treatment at the hands of the law; here too, in largely disregarding class, Australia followed the English example.[92]

"Punishments" for attempted suicide in the ordinary case varied slightly among times and places : sometimes it was imprisonment until the rising of the Court (particularly popular in New South Wales),[93] sometimes a minute's or a few hours' imprisonment,[94] sometimes an absolute discharge[95] and perhaps most often being bound over to keep the peace (meaning, of course, not to offend again, in particular by attempting suicide) with the support of one's own and/or others' recognisances – these being the people who were meant to take charge of the unfortunate person. In Forbes, New South Wales, for example, a sentence of a minute's imprisonment on Theodore Bignold Prothero 'was most religiously carried out […], Constable Duffy standing guard, watch in hand, exacting the full sixty seconds'.[96] When Annie Bowden Mills jumped into the River Torrens in Adelaide in October 1894, and upon being fished out declared that she had wished to end her life because her husband had been cruel to her, the case was adjourned to allow Mr Mills, the manager of the Bijou Theatre, to appear before the Court.[97] On the next day he was in attendance, but before he could be called defence

[91] *Statistics of the Colony of Tasmania for the Year 1899* (Government Printer, Hobart 1900), p. 311.
[92] MacDonald/Murphy, above n 14 at 133f.
[93] *E.g.* "Evening News" (Sydney), 8 December 1892, p. 6; "Sydney Morning Herald", 13 July 1893, p. 3; "Goulburn Evening Penny Post", 7 September 1893, p. 4; "Evening News" (Sydney), 26 December 1894, p. 5; "Australian Star" (Sydney), 3 March 1897, p. 6; "National Advocate", 31 October 1898, p. 2; above, fn 45. The sentence may however also be found elsewhere, as above, fn 77.
[94] *E.g.* "Evening News" (Sydney), 11 May 1894, p. 4; 30 July 1894, p. 5.
[95] *E.g.* "Evening News" (Sydney), 28 May 1884, p. 3; "Argus", 12 August 1886, p. 6; "Geelong Advertiser", 15 April 1887, p. 3; "Age", 20 November 1896, p. 6; other cases mentioned in this essay.
[96] "Sydney Morning Herald", 2 October 1883, p. 7.
[97] "South Australian Register", 24 October 1894, p. 7.

counsel – he was not bound to state on what instructions he made this suggestion or the reasons for them – suggested simply binding over the defendant to keep the peace instead of calling him, and then releasing her into the care of her father, a prominent shipwright,[98] and brother (we do not know again why an all-male cast was chosen; she may not have had sisters). The Magistrates agreed, and 'spoke to the defendant on the enormity of her offence and said she had rendered herself liable to a long term of imprisonment, and if she made any similar attempt in future she would be severely dealt with'. She promised not to offend again and was released.[99] Less than two years later she appeared in Court again and was fined 10*s*[100] for drunkenness, and the same thing happened again early in 1897.[101] She did not keep the promise she had made to the Magistrates in October 1894 : in early June 1897 she succeeded in doing away with herself at her father's residence, where she had taken up quarters after her husband had left her owing to her alcoholism.[102]

It was very common too for the accused to be simply discharged, perhaps with a lecture along the lines such as we have already read, if there was some responsible person who agreed to provide care, and usually that person would also provide surety for good behaviour for a few months or years into the future; this was often a relation, parents in the case of a young adult, but sometimes merely a friend.[103] Instances occurred in which the friendless accused was liberated as soon as assistance from the Salvation Army or a similar organisation arrived.[104] Occasionally the defendant's solemn promise not to attempt the act again[105] or to sign the pledge[106] was accepted as sufficient for discharge (or

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[98] "Register", 8 November 1907, p. 4.
[99] "Advertiser", 25 October 1894, p. 6.
[100] "Advertiser", 6 August 1896, p. 6.
[101] "Register", 7 January 1897, p. 7.
[102] "South Australian Register", 3 June 1897, p. 6.
[103] *E.g.* "Evening News" (Sydney), 2 February 1884, p. 6; 25 September 1890, p. 4; "Goulburn Evening Penny Post", 5 September 1891, p. 3; "Bunyip" (Gawler), 10 February 1893, p. 3; "Daily Telegraph" (Sydney), 5 August 1896, p. 3; "Argus", 22 March 1897, p. 6; "Herald" (Melbourne), 18 June 1897, p. 5 (with promise to send wife's allowance by post in future rather than taking it to her in person); "Evening News" (Sydney), 3 March 1898, p. 3; "Argus", 15 August 1898, p. 3; "Age", 24 November 1898, p. 7; "Daily News" (Perth), 7 December 1899, p. 4.
[104] *E.g.* "Argus", 28 September 1893, p. 9.
[105] "Australian Star" (Sydney), 9 May 1894, p. 6; 16 April 1895, p. 5; "Evening News" (Sydney), 22 January 1896, p. 5; "Daily Telegraph" (Sydney), 22 February 1898, p. 7; "Coburg Leader", 23 July 1898, p. 3; "Evening News" (Sydney), 1 March 1899, p. 5.
[106] "Geelong Advertiser", 1 October 1883, p. 4; "Evening News", 1 November 1893, p. 5. Solemn advice to abstain from alcohol was also frequent, as for example in "Herald" (Melbourne), 10 January 1882, p. 3. James Tobin was sentenced to the unusually long term of a year's imprisonment in "Bathurst Free Press and Mining Journal", 24 October 1885, p. 2 despite promising not to touch drink ever again, although with a promise of liberation after six months if he could find sureties, which did occur : "New South Wales Police Gazette and Weekly Record of Crime", 12 May 1886, p. 141. No obvious explanation for this appears, but there are some earlier cases in which a man of the same name is arrested in neighbouring towns for drunkenness, so probably the explanation lies in the need to attempt to break the habit of drunkenness rather than any severity on the

what is essentially the same thing, imprisonment till the rising of the Court) with or without formal support from relations or friends. No doubt being "respectable" sometimes helped a bit,[107] but there were also cases in which decidedly unrespectable people were the beneficiaries of such indulgence – and here Victorian-era newspapers, in describing persons of the female persuasion who fell within this supposed category, did nothing to dispel stereotypes about the views of the era on the score of societal control of female sexual behaviour. One example was Margaret Donoghue, who appeared in the Fremantle Police Court in July 1897, having recently arrived from Melbourne and 'alleged to be of loose character'.[108] She repented of her deed and was discharged with a caution. In South Melbourne in 1899, Priscilla Gilbert, fresh out of prison on a six-month sentence for vagrancy and described as a member of a 'very dissolute set', a 'waif[] of the slums' and an 'immoral woman',[109] was also discharged after a 'severe lecture'[110] on her own promise not to repeat an attempt at suicide, although in her case she had spent a week in the gaol hospital on remand waiting for this decision.[111] One Frances Andrews promised to look after her.[112] Jane Richardson was bound over to keep the peace for three months along with providing sureties in Launceston in 1881 even though the Magistrates must have recognised her from previous appearances in less than salubrious circumstances, sometimes along with other 'disreputable women',[113] and it was her second suicide attempt;[114] a few months later she was living in a brothel in Hobart and sent to prison for three months for robbing the lady in charge of that establishment.[115]

In other cases prison for a week, a fortnight or a month was decreed, but almost always solely for medical purposes and in some cases also to guard against a hasty repetition of the attempt and ensure that the defendant was completely sober before being set at liberty.[116] This occurred, for example, to Kate Garner, a 43-year-old widow, who jumped into the sea near Mosman Bay in Sydney on account of her poverty. At some risk to himself, she was rescued by a young man who jumped in after her,

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part of the Judge (Innes J.). There is a similar example involving his Honour and a clear case of drunkenness in "Sydney Mail and New South Wales Advertiser", 17 October 1885, p. 826.

[107] Apparent respectability is even sometimes mentioned in the reports, although they were written by newspapermen not by the Judges and Magistrates who decided the case. See, for example, "Herald" (Melbourne), 10 January 1882, p. 3; above, fn 81.

[108] "West Australian", 29 June 1897, p. 6.

[109] "Age", 24 April 1899, p. 6.

[110] "Herald", 10 October 1899, p. 4.

[111] "Argus", 4 October 1899, p. 4.

[112] "Argus", 11 October 1899, p. 4.

[113] "Launceston Examiner", 16 August 1881, p. 2.

[114] "Telegraph" (Launceston), 5 October 1881, p. 3; "Launceston Examiner", 6 October 1881, p. 2.

[115] "Launceston Examiner", 13 February 1882, p. 3; "Mercury", 13 February 1882, p. 2.

[116] *E.g.* "Sydney Morning Herald", 9 January 1891, p. 5; "Record" (Emerald Hill), 4 September 1897, p. 4.

and on their return to *terra firma* she received much sympathy and some money from bystanders. The Magistrate sent her to prison for fourteen days under medical observation.[117] Others were sent to the Benevolent Asylum or a similar refuge, particularly if they claimed ill-treatment at home.[118] Remand powers were used to keep an eye on the defendant and buy time to assess the situation : thus on New Year's Eve 1895 William Rickards was remanded for medical observation as he 'appeared to be wrong in his mind';[119] having recovered physically and being in his right mind again also by 6 January, he was discharged by the Magistrates with a severe caution.[120] Even comparatively long sentences could be benevolent, as one Judge, after imposing three months, explained :

> [T]he sentence was passed not as a punishment but for the benefit of the prisoner who would not be treated as a criminal but would receive medical attention, and if the medical authorities recommended his release before the expiration of three months he would not oppose the recommendation.[121]

Occasional merciful verdicts of not guilty are also recorded. One such may well have been that for John James Goldsmith mentioned above.[122] An even more certain case is that of James McHattie, tried in Ballarat in October 1881. The evidence at committal established that he had been handing

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[117] "Evening News" (Sydney), 23 February 1894, p. 5. Similar orders : "Sydney Morning Herald", 30 July 1892, p. 12; "Maitland Daily Mercury", 30 May 1898, p. 5. One week, already served : "Sydney Morning Herald", 10 August 1893, p. 3; seven days (and here the report uses the coded language of the time for single pregnancy, further justifying medical treatment) : "National Advocate" (Bathurst), 20 November 1895, p. 2; one month : "Western Grazier" (Wilcannia), 18 November 1896, p. 2; six weeks : "Nowra Colonist", 23 August 1899, p. 2.

[118] *E.g.* "Sydney Morning Herald", 6 February 1892, p. 5; "Maitland Daily Mercury", 20 January 1896, p. 3. One man chose gaol instead of the charity offered by the Asylum : "Daily Telegraph" (Sydney), 24 November 1896, p. 2.

[119] "Age", 1 January 1896, p. 7.

[120] "Argus", 7 January 1896, p. 6.

[121] "Richmond River Herald and Northern Districts Advertiser", 27 June 1891, p. 2. Another example is Jeremiah Craig, sentenced to four months at Wagga Wagga, but only because it was dangerous to allow him to remain at large; he was drinking heavily and may also have been suffering from some psychiatric condition : "Wagga Wagga Advertiser", 22 November 1890, p. 2; 25 November 1890, p. 3; 29 January 1891, p. 3. "Melbourne Punch", 5 February 1891, p. 7, chose for no apparent reason this case to 'laugh a loud coarse laugh' at the foolishness of the law in punishing attempted suicide, but in doing so failed to grasp that the punishment was not worthy of that name. Yet another example is in "The Armidale Express and New England General Advertiser", 14 April 1885, p. 2 (six months but for person apparently insane to be kept under medical observation).

[122] See above, fn 60. Another example appears to be James Stacey, "Bathurst Free Press and Mining Journal", 21 April 1891, pp. 2f; it is interesting to read that the accused appealed for mercy to those on the jury who had known him for many years and was then found not guilty.

over possession of his forge to one Hare – why exactly this was occurring we are not told, but it is reasonable to conclude that the occasion was not a joyful one for Mr McHattie as he had asked for the property to be withdrawn from sale[123] – and a further reduction in his degree of satisfaction with his life on this occasion was produced by alcohol. He was found with wounds to his wrist and heart and could think of no better story upon being challenged by the police than that he had injured himself while cutting paper.[124] His committal had been delayed by a week because he was not in a fit state to attend Court,[125] but at trial Stawell C.J. nevertheless 'summed up greatly in favour of the prisoner, and pointed out there could only be conjecture as to how the wounds had been inflicted, no-one having seen them made'.[126] The jury took the hint and acquitted McHattie.[127] He died only three years later, but of natural causes.[128]

Magistrates and Judges on occasion went beyond the call of duty in seeking to assist people in trouble. In at least one case a woman claiming poverty owing to her husband's neglect was advised by the Bench to take proceedings for maintenance against him and received the sum of £2 collected on the spot from the Bench and the lawyers in Court, quite enough to buy the necessities of life for a week or two;[129] something similar may well have happened on other occasions also without a record being left in the pages of history. Another woman received a simple discharge with a 'severe reprimand'[130] after being allegedly ill-treated by her husband; the Bench asked the police to look into the allegations against the husband, to whom someone had given a probably well-deserved clip around the ears at the scene of the attempt.[131] In November 1889, John Church Couty burst into tears in Court on being told that he would be sent to gaol rather than the Benevolent Asylum while he awaited trial for attempted suicide;[132] thereupon a complete stranger offered to put up bail so that he could go to the

[123] See McHattie's statement at committal on 29 August 1881 in the prosecution file, VPRS 30/P0/29/569.
[124] "Ballarat Courier", 30 August 1881, p. 4; "Ballarat Star", 30 August 1881, p. 4.
[125] "Ballarat Star", 23 August 1881, p. 3.
[126] "Ballarat Star", 24 October 1881, p. 3.
[127] VPRS 30/P0/29/569.
[128] "Ballarat Courier", 16 July 1884, p. 2 ('after a short illness'); "Ballarat Star", 16 July 1884, pp. 2, 3; 17 July 1884, p. 2.
[129] "Record" (Emerald Hill), 21 December 1895, p. 2. This sum was only slightly less than the minimum weekly adult male wage (£2/2 or forty-two shillings) established a decade or so later by the famous *Harvester Case* (1907) 2 CAR 1 and meant to be sufficient to maintain a whole family in 'frugal comfort' (at 4). For an extended consideration of the value of this sum extending back into the period under review here, see P.G. Macarthy, "Justice Higgins and the Harvester Judgment" in Jill Roe (ed.), *Social Policy in Australia : Some Perspectives 1901 – 1975* (Cassell Australia, Stanmore 1976), ch. 1.3. Contrast the basic old-age pension of 10*s* (half a pound) per week introduced by the *Old-age Pensions Act* 1900 (Vic.) s 2 and the *Invalid and Old-age Pensions Act* 1908 (Clth) s 24 (1).
[130] "Argus", 24 November 1892, p. 10.
[131] "Independent" (Footscray), 26 November 1892, p. 3 (two reports).
[132] "Evening News" (Sydney), 22 November 1889, p. 2.

Asylum.[133] In Brisbane in 1890, the Magistrate (Mr Philip Pinnock) made a public appeal for work to be found for Edmund Wheeler, who had attempted suicide only because of his desperation at being unemployed and destitute; Mr Pinnock had earlier had the public hospital rung to ask about the possibility of Wheeler's admission there rather than in the gaol hospital as the treatment would be better.[134] The charge against Wheeler was dropped a week later.[135] But there was no happy ending to this story. Mr Wheeler obviously did not find work, was arrested for vagrancy around the end of 1890 and hanged himself in gaol just before his sentence for that offence was to expire.[136]

4. Exceptions

In four classes of case the accused might need to reckon with less than the usual dose of mercy from the Court : where the intention to repeat the attempt was expressed or such attempts had already been made; if there were no family members, friends or other people ready to offer refuge and counsel to the rescued suicide; when the accused had endangered other people or the law's processes; and when the accused encountered a particularly tough Judge on a bad day. Particularly in the 1880s, before the offence became triable summarily under s 18 of the *Criminal Law and Evidence Amendment Act* 1891 (N.S.W.), the Courts of New South Wales appear to have taken a harder line more often than from the end of 1891. It may also be that there was the odd case of serious punishment for attempted suicide which would not fit into one of the above categories; given the numbers, it was impossible to review them all;[137] but the four categories mentioned emerge from a reasonably good sample of all cases that may be found in the newspapers and elsewhere.

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[133] "Freeman's Journal" (Sydney), 30 November 1889, p. 8. For unrecorded reasons he received a sentence of two weeks' imprisonment; from the report we read his claim that his attempted suicide was caused by his wife's death and ensuing depression : "Sydney Morning Herald", 6 December 1889, p. 7. He succeeded in killing himself about three-and-a-half years later, his last recorded words being that drink had been the curse of his life – perhaps also supplying the reason for that sentence of two weeks' imprisonment : ""Daily Telegraph", 23 June 1893, p. 4.

[134] "Brisbane Courier", 8 August 1890, p. 2; 13 August 1890, p. 3. A similar case : "Morwell Advertiser", 25 November 1898, p. 3.

[135] "Telegraph", 16 August 1890, p. 4.

[136] "Brisbane Courier", 13 April 1891, p. 4.

[137] See further above, fn 14.

Cases in which repetition of the event had occurred or was seriously to be feared are the easiest of all to understand, for this class of case is merely an extension of the protective function that we have already encountered. In addition to the option of imposing a term of imprisonment, some lower Courts refused to deal with the matter summarily but rather committed the defendant for trial in the higher Courts.[138]

John Archibald McLachlan, a young customs officer who shot himself in Sydney in 1894, provides an example. On being taken into custody he said to the constable, 'I have done a very foolish thing to-night, but next time I try it I'll get a larger revolver'. The Magistrate was evidently convinced of the seriousness of this statement and said to McLachlan in sentencing that it 'shows that we must do something to protect you, and I cannot give you a lighter sentence than two months'.[139] Three years later one Lily McMurtie refused to go with the ladies from the Young Women's Christian Association when they offered her aid, but instead affirmed her intention to 'make a good job of it next time'.[140] 'To give her time to change her views on the subject',[141] as one of the newspapers put it, she was sent to prison for a month.

Attempts some time in the past could also have the effect of denying the accused the usual merciful consideration. Margaret Wylie had attempted to commit suicide no less than nine years earlier[142] when she tried again in Lithgow in 1890, no doubt under the influence of drink. Docker D.C.J., a generally tough sentencer,[143] said :

> it was clear that the woman could not be trusted. She was so addicted to drink that any warning he might give her would have no effect. Not long ago a Judge in one of the Courts had discharged a prisoner without punishment who was charged with an offence of this kind. Within a week after the accused committed suicide. In this case accused might also make a

[138] Examples from Victoria include "Argus", 8 January 1894, p. 6; 27 January 1896, p. 6.
[139] "Australian Star", 28 March 1894, p. 5.
[140] "Evening News" (Sydney), 21 July 1897, p. 5.
[141] "Newcastle Morning Herald and Miners' Advocate", 22 July 1897, p. 5.
[142] The report in the "Bathurst Free Press and Mining Journal", 28 July 1890, p. 2, says nineteen; the "Sydney Morning Herald", 29 July 1890, p. 5 twenty-nine! This is evidence that the figure must have been hard for the reporters in Court to hear as well as a more general reminder that newspaper reports can be fallible even though they are often all we have got. The true figure of nine years, which it is hoped Docker D.C.J. heard correctly, emerges from the "New South Wales Police Gazette and Weekly Record of Crime", 27 July 1881, p. 271.
[143] See his biography in the *Australian Dictionary of Biography*.

> further attempt, but if she did, it would be after punishment. The sentence of the Court was that she be imprisoned in Bathurst gaol for three months with hard labour.[144]

McFarland D.C.J. was another tough sentencer, whom we shall encounter again in another case later. In 1888 he was presented with the case of Albert Edward Cox, for whom pretty much every possible mitigatory circumstance could be brought forward : he pleaded guilty, had been under the influence of drink at the time, was only twenty-two years old, promised not to touch drink again and had an employer who was willing to take him back immediately and appeared in Court in person to give character evidence. His Honour stated that he would have bound him over on his own recognisances and those of the employer were it not for the fact that Cox had previously attempted suicide in Wagga Wagga, as a result of which he received a sentence of three months' imprisonment coupled with a request by his Honour to the prison authorities to keep him separately from the other prisoners.[145]

Cases of the second type, in which no community support (as we might say today) could be found for the person affected, appear to have been quite rare; as we have seen from time to time, religious groups would step in, or attempt to do so, and fill the void for those who 'stood in tears amid the alien corn'. However, it did occasionally happen that no such support existed : a farm labourer in his early twenties named Henry Cooper, for example, found himself spending three months in prison in Gladstone, South Australia, because he could not find two sureties.[146] At the end of that period he was sent to the lunatic asylum on medical advice owing to delusions and being dangerous to himself,[147] perhaps suggesting why his father and siblings had not hastened to his aid (they being presumably of the view that his life was safer in gaol than outside it). In Goulburn in 1882, Joseph Hunter also found himself in prison after being unable to find sureties from among any friends or family he may have

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[144] "Bathurst Free Press and Mining Journal", 28 July 1890, p. 2. Minor typographical errors appear in the extract but do not reflect what his Honour said and have been corrected silently. The next case, John Bash, appears from the report to have the same outcome, despite the far less serious features of his attempt at suicide – most obviously what appears to be concussion or brain damage resulting from a recent accident. However, a reference to the report in "National Advocate", 29 July 1890, p. 2, shows that his Honour sentenced Bash 'nominally' to three months for the purpose of medical attention and 'hoped his friends would see after him'. The effect is that, as in the general run of cases, Bash would be liberated as soon as healthy and blessed with friends to look after him.

[145] "Goulburn Evening Penny Post", 7 June 1888, p. 4. See also above, fn 82, for another case of this class.

[146] "Register", 23 April 1884, p. 6.

[147] "Areas Express and Farmers' Journal" (Gladstone), 18 July 1884, p. 2.

had, while the next customer, an elderly man called George Fleeton who had also attempted suicide and was dealt with on the same day by the same Judge, was released because he did have them.[148]

Our third category was the endangerment of others or the law's stately progress. The first sub-item on this list is represented by Henry Watson, an unemployed 52-year-old lithographer with a wife and two children,[149] who at the end of a Sunday card-playing evening involving his wife and a few friends suddenly directed to her in front of her friends the mysterious question whether she intended to go on living as she had over the previous week. His wife, after asking him to repeat the question, told him to go to hell, whereupon he went out and shot himself in the mouth but survived.[150] The Magistrates considered that he was a danger to the public given that he had a loaded revolver, and not even a plea from his wife – which but for that point would almost certainly have sufficed – would shake their resolution to keep him in prison for a further week by adjourning his trial.[151] He was discharged after that week, nearly a month after his original suicide attempt (during which time he appears to have been either in hospital or in prison),[152] on the payment of costs, 'the Bench expressing the hope that his past experience would be a lesson to him'.[153] Another example is Edward Walsh, who threw himself in front of a tram in Sydney and was sentenced to the extremely long term of twelve months' imprisonment with hard labour because he 'had not only put his own life in jeopardy, but he had endangered the lives of a number of other persons';[154] by way of comparison, four other persons were dealt with for attempted suicide by the same Judge in the same session and none of them saw the inside of a prison cell.[155] The other sub-category was again a specialty of New South Wales, where it was reasonably common for people to be arrested for offences such as theft or being a 'suspected person' under the vagrancy statute 15 Vic. No. 4 (1851) (N.S.W.) s 3 and while in prison attempt to kill themselves. Showing, for once, some of the inexorable heartless bastardry that stereotypes of the late Victorian era would lead us to expect, the Courts sometimes told such persons that their attempts

[148] "Southern Argus" (Goulburn), 4 May 1882, p. 2. Another example is in "Dubbo Dispatch and Wellington Independent", 15 April 1887, p. 4.
[149] "Age", 11 April 1893, p. 7; "Argus", 11 April 1893, p. 6.
[150] "Age", 28 April 1893, p. 7; "Argus", 28 April 1893, p. 7.
[151] "Prahran Telegraph", 29 April 1893, p. 3.
[152] "Herald", 22 April 1893, p. 8.
[153] "Prahran Telegraph", 6 May 1893, p. 3.
[154] "Sydney Morning Herald", 3 March 1884, p. 7.
[155] "Sydney Morning Herald", 29 February 1884, p. 3; 4 March 1884, p. 5.

to commit suicide were attempts to evade justice or the law's majesty and punished them with several months' imprisonment with hard labour.[156]

Finally, as anyone who has at any time been in or near the criminal Courts knows, sometimes the accused just has the bad luck to get a tough Judge on a bad day or a Judge with a personal aversion to the crime in question or an empathy deficit more generally – and at this time there was the further disadvantage, no longer the case today, that there was no formal system for appealing against sentences on such grounds as that the sentencing discretion must have miscarried. One such Judge appears to have been McFarland D.C.J.,[157] who on one day in Wollongong passed a 'lenient sentence', as he described it, of two months' imprisonment on Ellen Lee, who had been driven to attempt suicide by rumours of an unplanned pregnancy, and another of six months on Thomas Wilkie despite testimony from a medical practitioner that he had not been responsible for his actions when he attempted suicide.[158]

A few years later his Honour struck again, remarking that suicide should be 'severely punished' even if attempted by a man of 'exceptionally good character'.[159] Thus Charles Bateman, who was despondent owing to unemployment and had attempted to drown his sorrows, was sentenced to four months' hard labour.[160] His Honour's sentencing remarks, as reported in the "Sydney Morning Herald",[161] are of great interest :

> He looked on suicide not only as an offence against the law, but as an offence against God; and with the greatest respect to his brother Judges who might differ from him, he considered that any attempt to take one's life away was an offence that should not be treated lightly. In the last case of the kind that came before him he passed a sentence of six months, and was called on by the Minister for Justice for a report, the Minister deeming the sentence excessive.

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[156] "Evening News", 11 September 1894, p. 5; 10 February 1896, p. 6; "Australian Star", 11 February 1896, p. 7 (where we learn that the accused demanded a jury after receiving his sentence and was told that it was too late).
[157] These are not the only cases in which his Honour passed surprisingly long sentences, but they are representative; see above, fn 14 and associated text.
[158] "Illawarra Mercury", 4 September 1884, p. 2.
[159] "Australian Star", 6 March 1889, p. 8.
[160] "New South Wales Police Gazette and Weekly Record of Crime", 3 April 1889, p. 115.
[161] 6 March 1889, p. 5.

> He reported on the case, and within twenty-four hours afterwards the prisoner was discharged. Notwithstanding this, he would continue to do what he considered was his duty. Taking the circumstances of this case into consideration, he would sentence the accused to four months' imprisonment in Darlinghurst Gaol.

The case in question that had called forth the request from the Minister for Justice was that of one Patrick Lee, 'a respectable looking young man'[162] who claimed to have been under the influence of drink and to have had a quarrel with his landlord[163] at the time of his attempt. Unfortunately it does not seem possible to discover any more about him or find the correspondence referred to by McFarland D.C.J.,[164] but his case does remind us that executive clemency was also a route that was occasionally open in the absence of a formal system of appeal.

In Victoria Madden C.J. was also accused in the "Herald"[165] of declaring a jihad on suicide when he sentenced one George Westhorp[166] to three months' imprisonment in 1894. The anonymous editorial scold described the usual practice :

> Not often, however, is punishment actually imposed. Rather does mercy largely season the exercise of earthly power in such cases. Seldom does an offender go beyond a Court of the

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[162] "Australian Star", 15 February 1889, p. 6.
[163] "Sydney Morning Herald", 15 February 1889, p. 7.
[164] Rachel Hollis of the State Archives of New South Wales has kindly advised the author that a reference to this correspondence can indeed be found in the index held at NRS-306, but the correspondence series NRS-307 is not complete and in particular does not include any correspondence from 1889, leaving us only with a single-line index entry confirming that there was indeed some correspondence; nor is there any extant judicial notebook or other obvious alternative source. The report from the Judge to the executive is nothing out of the ordinary and simply allows the Judge to state his views on the prisoner's necessarily one-sided plea for mercy without any implication of subordination; *Criminal Appeal Act* 1912 (N.S.W.) s 11 is a remnant of this practice.
[165] 28 April 1894, p. 4.
[166] Mr Westhorp seems to have spelt, or have had spelt for him, his name with about as much consistency as William Shakespeare : in particular, often there is an "e" at the end, thus : Westhorpe. I have chosen to spell the name in the manner shown in his death notice (see below, fn 176) and on the front cover of and almost consistently throughout the official file on his prosecution, on the cover of which it is noticeable that someone has deliberately erased an "e" at the end of his name : VPRS 24/P0/971/181.
It is also interesting to see that as long ago as 1869 one George Westhorp had witnessed a suicide : VPRS 24/P0/230/1869/1006; "Herald", 7 December 1869, p. 3. This gentleman carried on the related occupation of restaurateur, and if it was the same man must have been in his mid- to late twenties in 1869. However, it may have been someone else, especially as there are other newspaper notices under that name around the same period referring to a wife named Margaret; Annie was the name of the wife of Westhorp in the 1890s (below, fn 172). I have had to resist the temptation to write Mr Westhorp's biography based on the meagre information available.

> first instance. Usage is kinder than the law. The magistrate having satisfied himself that the accused is repentant, and that friends are prepared to look after him, says a few words of sympathetic admonition, and sends him back to "make the best of both worlds". Or, finding that the degree of insanity, of which the tendency to suicide is usually a symptom, is such as renders the course necessary, he commits his poor, broken-down brother man to a suitable asylum.

The writer asked why this general approach was not applied to Mr Westhorp and what lessons he could learn about endurance and courage that he had not already learnt in his roughly fifty years of life, and pointed out that by depriving his wife and children of his earning power and company for three months Madden C.J. had done exactly what he had upbraided Westhorp for attempting to do, albeit permanently.

George Westhorp first attempted suicide in mid-January 1894 after losing his job as a waiter in a café in Bourke Street owing to the depression and finding it difficult to obtain another; he just survived that serious attempt[167] when he tried again at the end of February, again gravely imperilling his life.[168] His wife appeared at his hearing in the Police Court at Carlton in early April – presumably he had been in hospital over March, or at least on remand – and gave him a good character as a husband but said that she could not undertake to ensure his well-being given that he had tried twice to kill himself within the space of a few weeks, whereupon the Bench took the unusual step of committing him for trial in the Supreme Court of Victoria.[169] It will be recalled that the situation of the unemployed was quite dire in this era, there being no unemployment benefit and nothing but the charity of friends, family or the Church available to support a man with a family but no job.

At the hearing before Madden C.J. on 23 April 1894 the government's Chief Medical Officer suggested that prison would not be harmful but might indeed benefit Westhorp; rest and nourishment would improve his physique and possibly also his state of mind. Madden C.J.'s sentencing remarks were as follows :

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[167] "Argus", 23 January 1894, p. 6.
[168] "Argus", 27 February 1894, p. 6.
[169] "Age", 3 April 1894, p. 7.

> The prisoner's was a serious offence to the state, and it was lamentable to see a man asking for mercy in respect of an offence which, though an artificial one, was indisputably considered an offence against the welfare of the state. Sorrow and affliction had evidently induced the prisoner to commit the offence without his having any desire to injure anyone else. The state had, however, very great interest in maintaining the existence and life of every member of its community, and it had a very remarkable interest in discouraging moral cowardice, which, after all, was invariably at the bottom of suicide and attempts at suicide. Everyone born into this world had an amount of trouble to go through, and almost every man was subjected to the sense of depression which the prisoner had felt. He (the prisoner) had a wife and three children dependent upon him, and instead of seeking to carry out the responsibility he deprived them of their breadwinner, and the comfort of his experience and knowledge of the world. The offence was in very marked contrast to those of brutality and wickedness that some persons, for their own ends, inflicted on others weaker than themselves. But for the prisoner's own interest he would have passed a very light sentence indeed, but after hearing the medical evidence he should order imprisonment for three months in gaol, and he hoped that by the end of that time the prisoner would remember that responsibilities and troubles were sent upon people to teach them to cultivate what was one of the nobler parts of man – endurance under affliction.[170]

It would be easy to contrast the situations of these two men in order to deprecate the sermon thus preached to Mr Westhorp, and the contrast, which could hardly have been starker, between his actual situation at that time and that of Madden C.J., whose salary was about thirty times the basic level necessary for subsistence[171] and who had at least no difficulty in knowing where his next meal would come from, must surely have occurred to both of them. It is not necessary to dilate on such an obvious contrast. We can however say that, despite what the "Herald" thought, Madden C.J.'s sentence was not out of the usual for or unduly harsh towards a man who had so recently twice attempted, and twice nearly succeeded in killing himself; it was passed on medical advice and was in Westhorp's own interests.

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[170] "Argus", 24 April 1894, p. 5; there is a shorter version not different in its gist in "Age", 24 April 1894, p. 7.
[171] This emerges from the fact that Madden C.J.'s salary was £3500 under s 15 of the *Supreme Court Act* 1890 (Vic.) s 15, while a basic subsistence wage for a family was declared in 1907 at 42*s* per week or just under £110 per year : above, fn 129.

When his wife died in 1897, of cirrhosis of the liver produced by the usual cause of that disease, Westhorp was again in employment,[172] but in the following year can be found taking the bold and eminently sensible step of presenting himself at the police station and essentially asking to be arrested, confined for what turned out to be five nights and brought to a doctor because he was afraid of committing another attempt on his own life; when presented to the Police Court at the end of his stay he declared himself 'all right now'.[173] That may well have been so, and certainly no praise is high enough for the action he took on this occasion and the intelligent self-awareness and humble courage it showed, but presumably he had again become unemployed, and there is no news of his children (some of whom however might by now have been old enough to work). It is pleasing indeed therefore to be able to record that the last known Court and newspaper appearance relating to Mr Westhorp occurred in 1909, when he must have been in his late sixties and all his children long since adults, when his employer at the Orrong Hotel was fined a small sum for allowing him, 'a "generally useful" hand',[174] to work in excess of the legal maximum of fifty-eight hours[175] in the last week of January.[176] He died in 1916 at the age of seventy-six of natural causes; his death certificate states his occupation as waiter,[177] but it may be hoped that some time after his sixty-fifth birthday in 1905 and the end of his working days he took advantage, after a long and hard life, of the newly introduced old-age pension of ten shillings per week.[178]

[172] VPRS 24/P0/678/1897/1235 is the coroner's inquest on the death of the wife Annie at thirty-seven years of age, in which we learn that George was away from the house to work as a waiter but visited regularly during the day. The constable's report dated 15 October 1897 adds that 'they appear to be in very poor circumstances as there is no furniture or bedding in the house'.

[173] "North Melbourne Courier and West Melbourne Advertiser", 15 April 1898, p. 2.

[174] "Prahran Telegraph", 27 February 1909, p. 5.

[175] Chapter VI reg. 1 (b) of the Regulations under the *Factories and Shops Act* 1905 (Vic.) s 145, published in the "Victoria Government Gazette", 4 April 1908, p. 1838.

[176] VPRS 1932/P0/27/115; "Argus", 27 February 1909, p. 15; "Age", 26 February 1909, p. 8. There is no more information about the Westhorp mentioned in these sources, such as his age, which might make the identification certain, but the occupation of waiter makes very probable the identification essayed in the text between the would-be suicide of 1894 and the employee of the Orrong Hotel in 1909, and there is no entry for any other person of that name in directories of the period.

[177] "Age", 6 June 1916, p. 12; Victorian Births Deaths and Marriages, death registration no. 7370/1916, which lists the cause of death as bronchial pneumonia and heart failure. The 1909 electoral roll for Bourke suggests that Westhorp might have spent his last years in the Little Sisters' Home, Northcote. His grave, in the Coburg cemetery, may once have been marked but is now devoid of any gravestone or other identification.

[178] See above, fn 129.

5. Conclusion

As is already apparent, the typical case of attempted suicide in our period was met with kindness and mercy, as in England, although those features were usually coupled with a mildly "tough love" style of pep talk couched in the vocabulary of the era – particularly for men, who were exhorted to show courage, manliness and endurance in future; those whose sorrows were caused by alcohol or whose perceptions of their situation were depressed by its effects were earnestly entreated, or even made to promise to abstain in future.

If it were objected that the talk of manliness and courage might cause men to bottle up their emotions in future and merely exacerbate their problems, it could be replied in the first instance that these exhortations were addressed to men who had perhaps shown too little reluctance to act on their impulses in the recent past, something which could well have caused their complete demise. We may even find ourselves in sympathy with the 'very severe lecture' that was administered, for example, by the Bench to one John Adam Lawlor, an engine driver with the state railways, who had hanged himself from a rafter at home in order to 'frighten his wife',[179] an act that also required the intervention of a neighbour, who was no doubt also put to a great deal of trouble and alarm, to cut him down and rescue him. Moreover, many of the appeals to show more endurance in the face of life's disappointments worked, with those thus addressed abstaining from further attempts at self-destruction and even going on to live to see their great-grandchildren.

It is certainly the case that many of the speeches made to men who had attempted suicide reflected the contemporary masculine ideal of 'neo-spartan virility as exemplified by stoicism, hardiness and endurance'.[180] Yet we must take care to eschew simplistic meretricious generalisations and judgments about the past; we must avoid 'building a kind of condescension into the very structure of our scholarly engagement with the past', for 'the supposedly "normative" [was] in fact much more diverse, flexible and just plain ragged than that imperious and tidy term suggests'.[181] Those quotations from a short

[179] "Argus", 10 July 1888, p. 10.
[180] J.A. Mangan/James Walvin, "Introduction" in *id.* (eds.), *Manliness and Morality : Middle-Class Masculinity in Britain and America 1800 – 1940* (Manchester U.P., 1987), p. 1.
[181] Stefan Collini, "Having Emotions the Manly Way", "Times Literary Supplement", 4 June 1999, p. 6. Another analysis from a somewhat different perspective may be found in Rainer Emig, "Low on Assurance : The Troubled Masculinity of Victorian Comedy" in *id.* & Antony Rowland (eds.), *Performing Masculinity* (Palgrave Macmillan, Basingstoke 2010), ch. 4.

but powerful essay by Professor Stefan Collini remind us not to subscribe to a caricature of the past in general or the Victorian era in particular, for concepts of masculinity in Victorian times were at least as complicated, contested and contradictory as they are today.[182] Some observers, as we have already seen, were decidedly of the view by the end of the Victorian era that there was already far too much indulgence for emotion as distinct from duty and endurance.[183] (Sir) Charles Lucas (1853 – 1931), a civil servant and historian writing about the totally unrelated topic of the government of colonies in 1891, may be found stating comparable grounds for unease : 'In England, the present age is one in which the spirit of humanity is carried almost to the extreme. Generous sympathy with weakness and suffering in any form goes out so far, that it is almost considered a virtue to be weak and a crime to be strong.'[184] Professor Peter Gay even identifies in the early twentieth century what might be called a sort of counter-attack on behalf of more spartan and stereotypical manliness as a result of these developments.[185] The expression of emotions and concessions of weakness even in public by men, as Professor Collini shows,[186] were not entirely *verboten* as signs of unmanly weakness in the Victorian era, least of all when they had encountered some crisis in their lives, nor did they disqualify men from masculine society. Furthermore, saying things such as that 'it was every man's duty to bear with fortitude the troubles of life that might fall to his share' rather than abandoning dependants and squandering 'the priceless gift of life'[187] does not constitute a denial that such problems existed or a suggestion that help should not be sought in future if it was needed – as George Westhorp, among others, certainly understood.

At all events, if these men by attempting suicide had transgressed against the code and failed to show sufficient masculinity, whether by allowing their emotions to overcome their reason or by reason of background causes of suicide attempts such as failing to be a self-reliant provider for their families – one of 'the costs to men of patriarchy'[188] – they were not expelled from the club forever but cordially invited to return to it. Many received every facility needed to do so, without denying their emotional needs or the various deprivations which had motivated their attempts – or the attempt was made at

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[182] This point is made with equally admirable brevity by both John Tosh in *A Man's Place : Masculinity and the Middle-Class Home in Victorian England* (Yale U.P., 2007), pp. xif and Graeme Smart/Amelia Yeates, "Introduction : Victorian Masculinities" (2008) 20 Critical Survey 1; and see Mangan/Walvin, above n 180 at 3.
[183] See above, fn 30.
[184] C.P. Lucas, "Introduction" in Sir George Cornewall Lewis, *An Essay on the Government of Dependencies* (Clarendon, Oxford 1891), p. xxxviii.
[185] Gay, above n 20 at 97f.
[186] See also Gay, above n 20 at 103f, 111.
[187] "Age", 3 November 1893, p. 6.
[188] Michael Roper/John Tosh, "Introduction : Historians and the Politics of Masculinity" in *id./id.* (eds.), *Manful Assertions : Masculinities in Britain since 1800* (Routledge, London 1991), p. 7.

least to find men without employment such as Edmund Wheeler a steady job. There is also no sign of any attempt to apply a feminine stereotype, for example of irrationality or excessive thraldom to emotion, to the female defendants : Miss Isabella Watt, for example, was merely told by Holroyd J. that 'he did not hold her responsible for the rash act which she committed in a momentary fit of desperation'.[189] (The adjective "rash" was very commonly applied to suicide attempts in this period, whether by men or women, just as media reports today frequently and tiresomely insert the word "coveted" before the name of any prize, award or honour.)[190]

These Court cases all constituted a performative act as well, both for men and women, with often considerable trouble taken over the would-be suicide indicating the gravity which the community represented by the law and its officials placed upon an attempt to commit suicide and the preservation of its citizens' lives. The would-be suicide was then usually informed additionally by a high official of the state, speaking from a place of unimpeachable authority, that the life of each member of the community including the person presently before the Court was precious to it – in the words of Madden C.J. just quoted, that '[t]he state had [a] very great interest in maintaining the existence and life of every member of its community'. If '[p]unishments express the sentiments of the collectivity',[191] as they certainly do – the expressive or denunciatory function of the criminal law – so also does the abstention from any punishment worthy of the name express values not only to the community as a whole, but to the person who is the object of them.

Merely bringing the person in front of such an authority figure emphasised the general community's interest in their lives and hope that the person concerned would choose to continue to be a part of the community. Even quite humble people, or outsiders such as unemployed men or women of supposedly ill repute were treated to this demonstration that their lives were not worthless in the eyes of their fellow creatures and the community. This act constituted, additionally, a sort of embryonic welfare check, with many accused being sent off to see the doctor or to a hospital (although noticeably, unlike in England,[192] there is little record of routine involvement by the Church beyond the provision of sureties to the friendless – perhaps owing to the absence of an established Church which considered it its duty to care for all within parish boundaries). While we have, or think we have far more

[189] "Bendigo Independent", 18 October 1895, p. 4, which has the best or at least the longest report on this score (but see above, fn 142).
[190] Horsley (1898), above n 47 at 302 calls "rash act" 'the minimising phrase of the penny-a-liner'.
[191] Mishara/Weinstub, above n 11 at 57.
[192] See above, fn 48.

sophisticated means of carrying out such welfare checks today, what happened in the late nineteenth century was far better than nothing.

The idea that the entire community was harmed by suicide was by no means a completely new one; it may be found as far back as Aristotle, who in the *Nicomachean Ethics* asks whom the suicide wrongs and proposes the answer : ἢ τὴν πόλιν, αὐτὸν δ᾽ οὔ; ἑκὼν γὰρ πάσχει, ἀδικεῖται δ᾽ οὐδεὶς ἑκών. διὸ καὶ ἡ πόλις ζημιοῖ[193] – could the wronged party be 'rather the state, and not himself? For he [the suicide] suffers voluntarily, and no-one voluntarily wrongs himself. Therefore the state punishes.' Blackstone states that suicide, in addition to being an offence against God because it involves 'rushing into his immediate presence uncalled for', is also an offence 'against the King, who hath an interest in the preservation of all his subjects'.[194] But what is this interest, what is the wrong against the state that justifies punishment? Sometimes it is said to arise, as in *R* v. *Russell*[195] in 1832, because the subject may be called upon to serve the state, on which reasoning the suicide of one member of the community amounts to something comparable to the abandonment of employment; but in late nineteenth-century Australia such reasoning would hardly be needed. Instead, common humanity triumphed, as a rule that did admit of exceptions, over the apparently dry and heartless letter of the law, and the state revealed itself as interested in the lives of its members for their sake and that of their families.

[193] Aristotle/H. Rackham (trans.), *The Nicomachean Ethics* (William Heinemann, London 1956), p. 318 (Book V, chapter ix, section 3 of the original; Bekker no. 1138a). Rackham translates this passage freely as follows at p. 319 : 'It [the injustice caused by the suicide] seems to be against the state rather than against himself; for he suffers voluntarily, and nobody suffers injustice voluntarily. This is why the state exacts a penalty'.
[194] Above n 28 at 125. See also *Hales* v. *Pettit* (1563) 1 Plow 253, 261; 75 ER 387, 400.
[195] Above n 37 at 365; 1305.