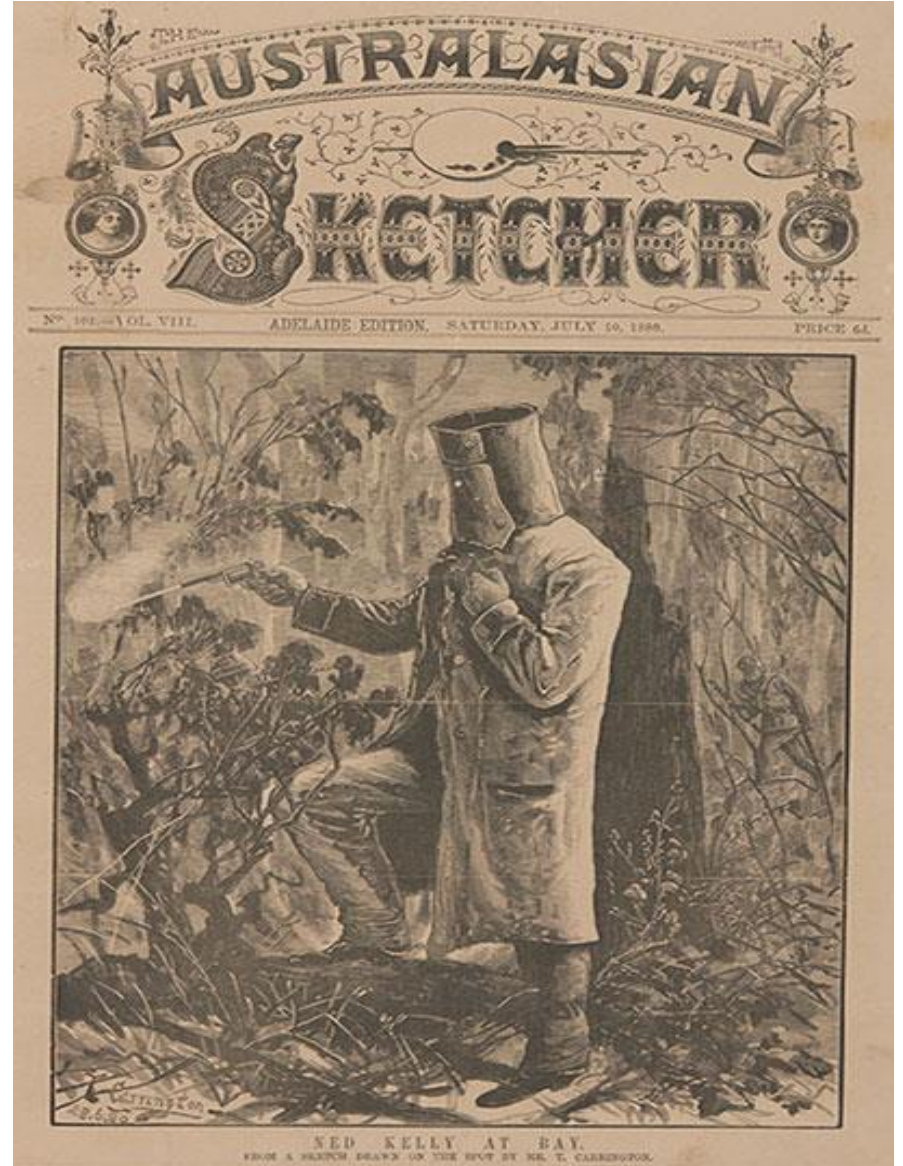


A Brush with the Law: Visual Representations of Sir Redmond Barry and the Trial of Ned Kelly



Structure

- Aim: compare and contrast official and unofficial images of the same judge and explore themes of judgment contained in the artworks.
- 1. How is Barry portrayed in artworks that are **not** connected with the Ned Kelly trial?
- 2. The Ned Kelly Story
- 3. How is Barry Portrayed in images of the Ned Kelly story? Does the portrayal of Barry change overtime?
- 4. Impact of the Ned Kelly story on pro-Barry images
- 5. Has Barry been misjudged? Questioning the underpinnings of anti-Barry images



1. How is Judge Barry portrayed in artworks that are **not** connected with the Ned Kelly trial?

The courthouse portraits will ‘hang there in like manner as the portraits of many of the **sages of the law** are held in the Courts at Guildhall.’



When Victoria built a grand courthouse in 1884, there was an ‘attempt to create an Australian pantheon of similar **legal sages**.’

Sage: *a person of wise judgment*



Barry as a 'sage of the law'. The sitter is a mannequin clothed in the signs and symbols of wise judgment:

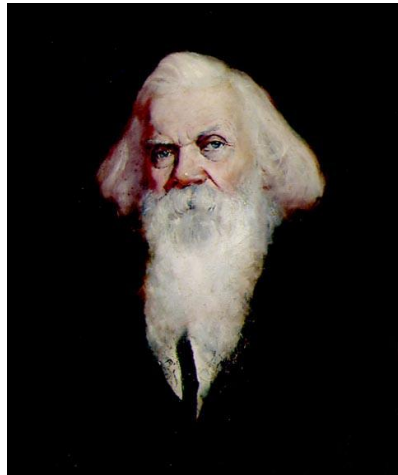
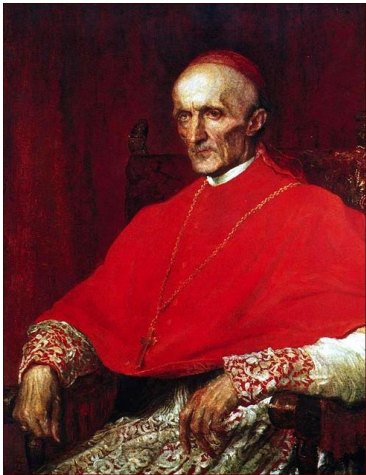
- Facial expression – *impartial, even tempered, even handed*
- Powerful stance and physical presence – represents *law's power, majesty and strength*
- The new courthouse – *civilization builder*
- 'Stately' full length standing portrait (not sitting) - *strength of character and managerial abilities*
- Judicial Clothing - *uniformity; authority, pro British*
- The judicial chair - *judicial lineage, continuity, consistency; the constancy and natural growth of the common law.*



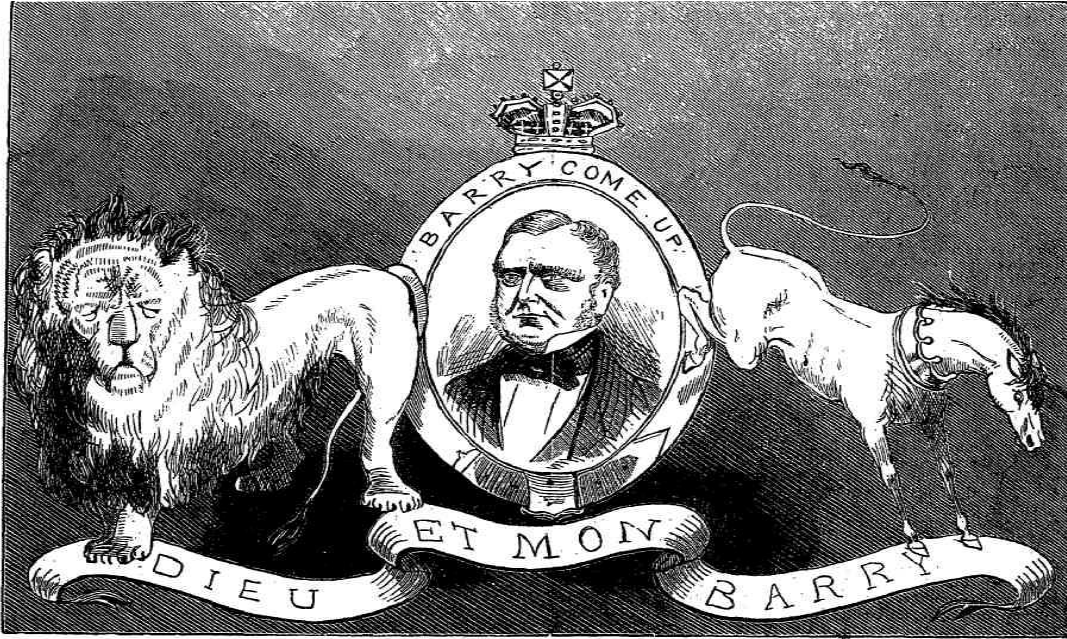
There was a refashioning of the judicial image in the pre-federation era – portraits became more ‘stately’ and strength of character / managerial abilities were virtues being portrayed.

Helen Irvine explains that the public needed to *imagine* the nation of Australia and the arts were a key enabler of this.

Tom Roberts created a trio of portraits called ‘Church, State and Law’. The *Bulletin* proposed rechristening the trio ‘The World, the Flesh and the Devil’ but ‘found it impossible to decide which was which.’



The facial expression shows ‘masculine decision, sternness eminence, and authoritative physical presence.’



DIEU ET MON BARRY



NAPOLEON BARRY

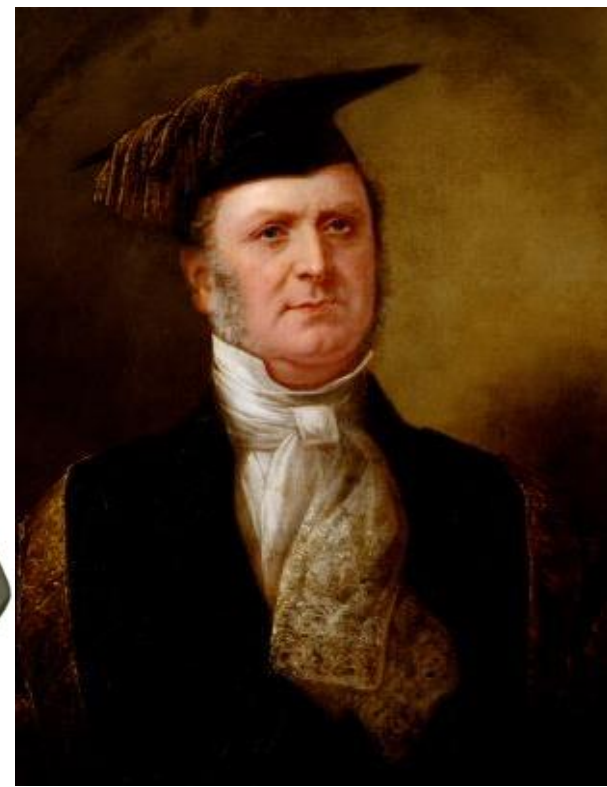
O Wise and Upright Judge



Other official images of Barry (not judicial portraits):

A different aesthetic to judicial portraits, but there were transferrable themes:

- Establishing Institutions
- Asserting order in a new society
- Bringing civilization to a new society



The Argus: 'it is a good likeness, though exception can be taken to the lower portion of the face, as not being sufficiently full.'

Family portraits:

- highlight the connection between the judicial role and the family leader – these were artworks of powerful men and their families. The man's position as family leader visually reinforces their position as a civic leader



- family portraits were not commissioned by judges who were in unmarried relationships with partners of lower status.
- It was a time when familial relationships were key factors in professional advancement.

Barry expected to be appointed Chief Justice. But Stawell was appointed by the Governor, based on his ‘impeccable record of legal service to the Crown...and a ... totally blameless personal life to go with it’.

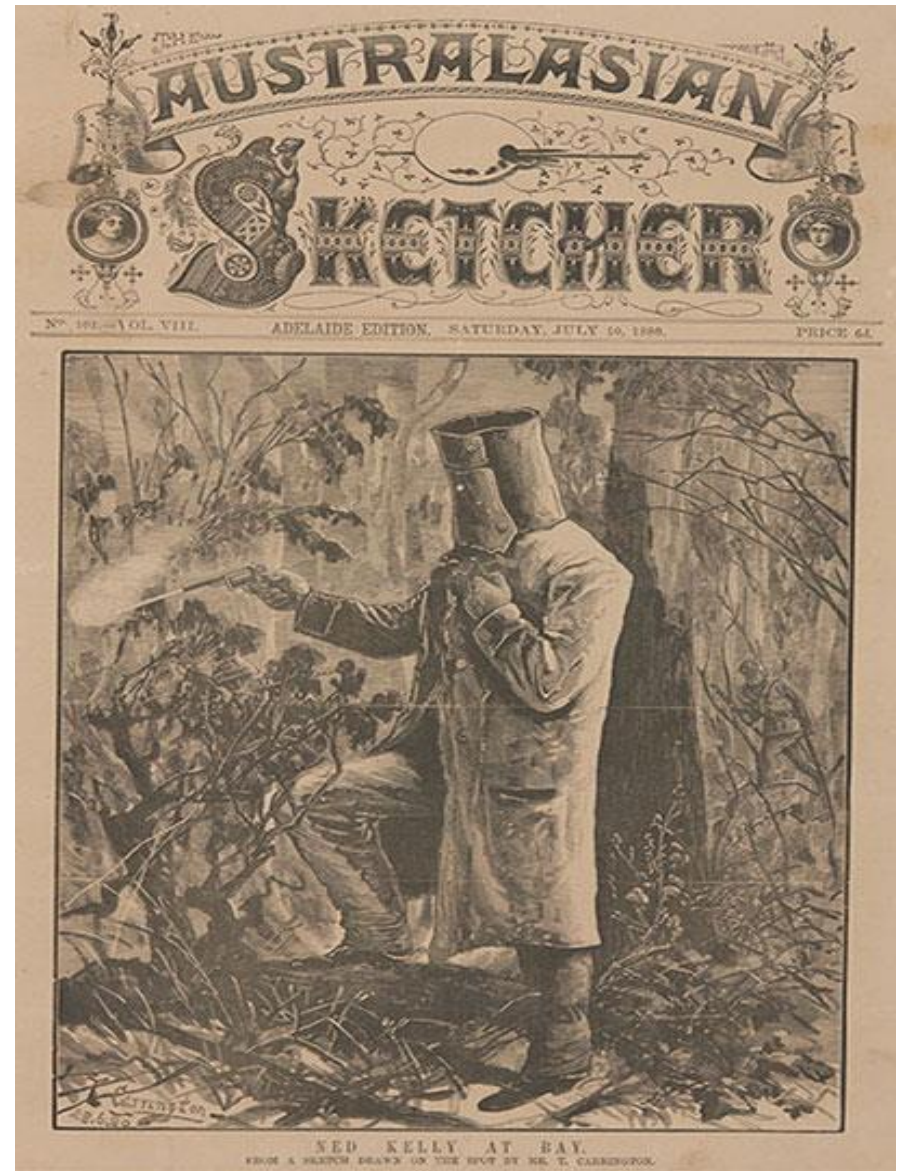
- In the 19th c there was a strong link between notions of wise judgment and the character / reputation of the judge.

‘The “white flower of a blameless life” is now demanded by public opinion of all our Judges. This is but right. It would be a terrible thing to hear a man of loose life utter the voice of moral indignation and sentence to punishment a fellow-being not worse – save in position – than himself. ... And Sir Redmond Barry has been before the community for more than twenty years...’

‘No doubt he feared she would not be accepted in the exalted colonial social circles in which he moved – other wives of dubious social position had suffered just that fate.’

- Chief Justice Hanson (SA) ‘A delegation... [had said] they must decline all invitations to Government House social functions if Hanson and his wife were to be invited.’
- Lutwyche was not made Chief Justice of Queensland. Sir Alfred Stephen stated Lutwyche's wife was 'unfit ... for the circle into which her husband's rank must place her.'





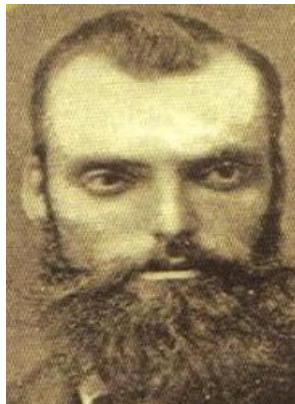
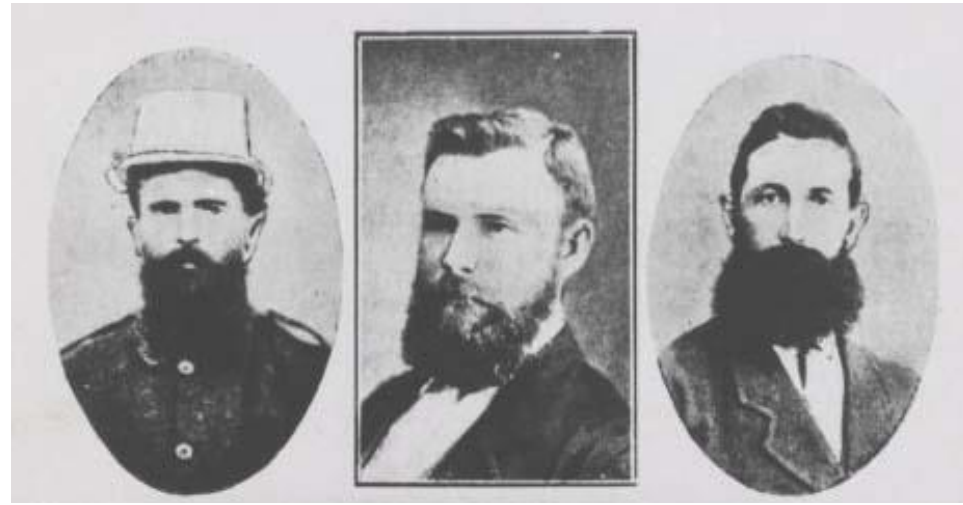
2. The Ned Kelly Story

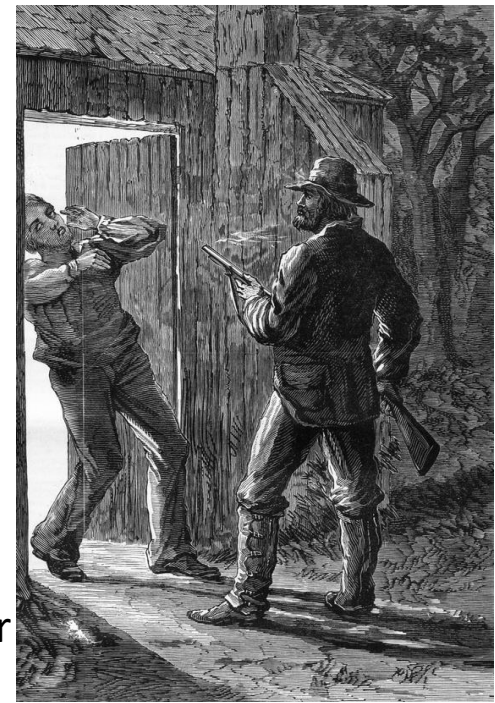
Today, popular perceptions of Barry are dominated by the Ned Kelly Story. According to fiction, inaccurate histories and modern myth:

Barry was an unjust judge who harshly sentenced Kelly's mother, Ellen, for aiding and abetting the attempted murder of a policeman. Kelly was not present at his mother's trial, and Barry remarked, 'If Kelly were here, I would have sentenced him to 15 years'. When Barry sentenced Ellen to three years' imprisonment, when she had a newborn, many considered Barry was too harsh. Peter Carey's famous novel *True History of the Kelly Gang* (2000), would have Ned Kelly describe the judge like 'a great fat leech hiding in the bracken its only purpose to suck the living blood', spurning Kelly's offer of surrender in return for his mother's release.

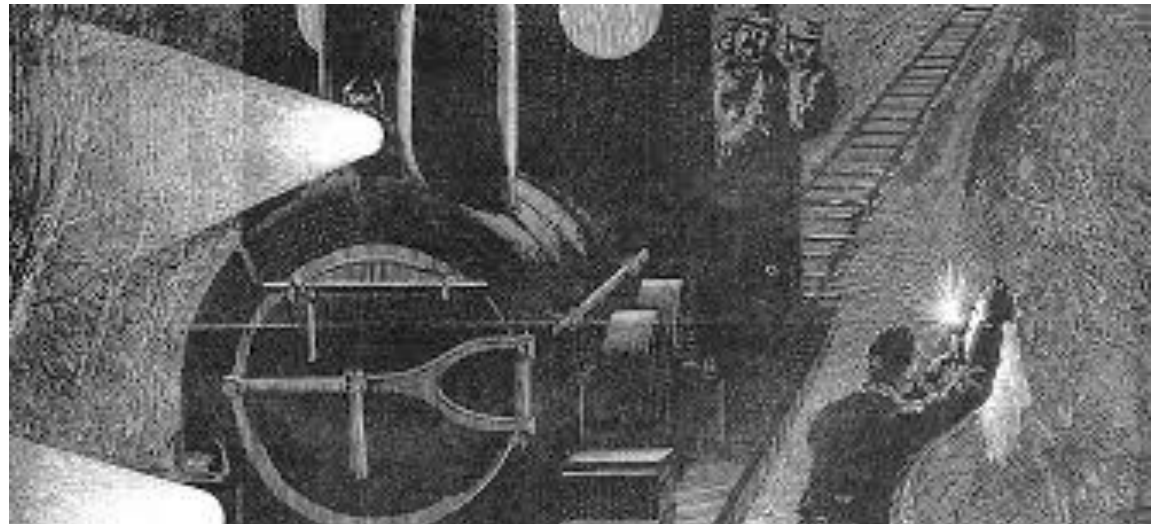
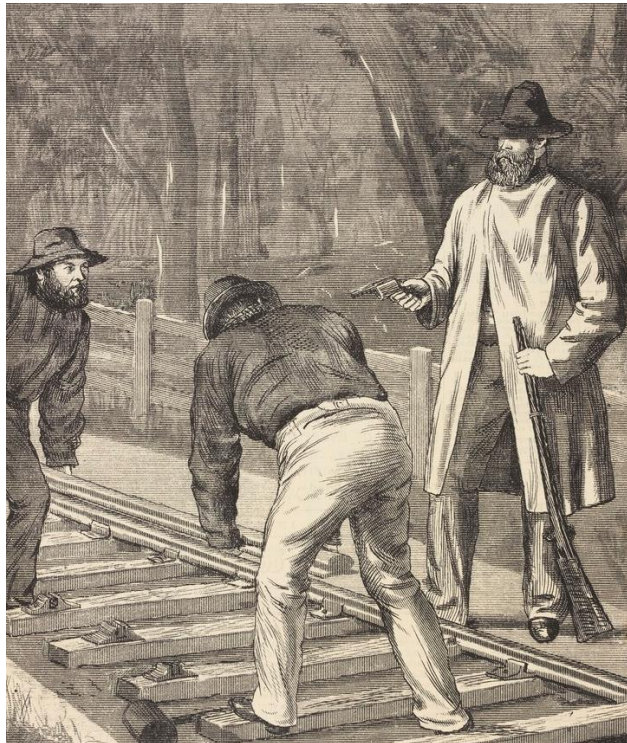


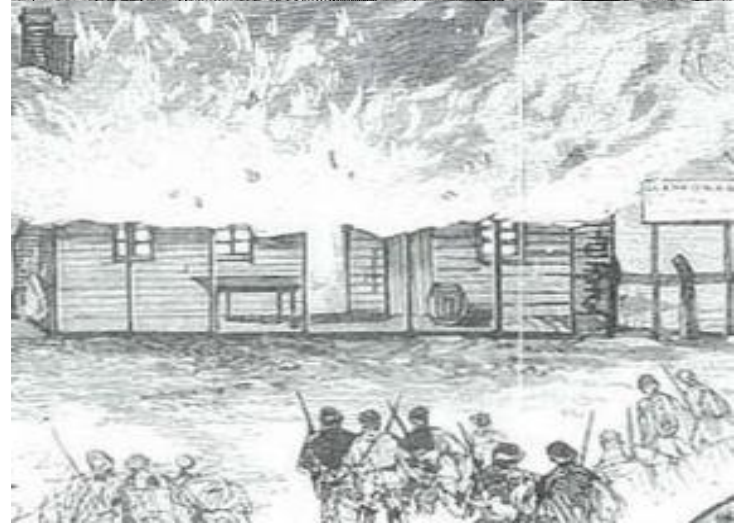
Barry's actions were the catalyst for Kelly's outlawry. Within weeks of Ellen's trial, four policemen went to Stringybark Creek to find where he was hiding. Kelly and his accomplices found them first, and shot three of them, however one escaped. Kelly had heard the police were out to kill him so he acted in self-defence. The authorities, however, believed it was cold-blooded murder and Kelly was outlawed, which allowed him to be shot on sight without trial and for his family and friends to be locked up without trial, on repeated remands. Barry presided over some of the court cases relating to the imprisonment of Kelly sympathizers.



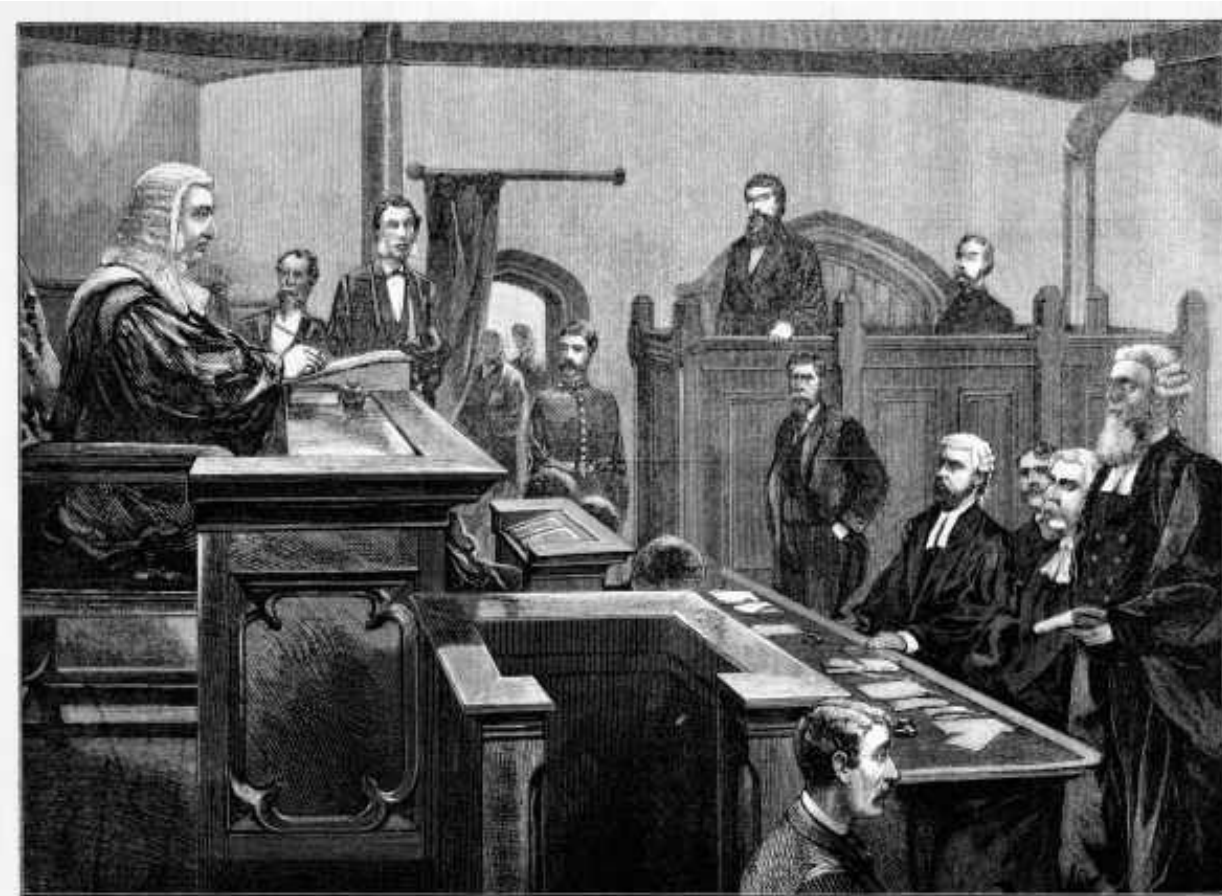


Kelly and his gang were on the run for two years. In that time, they robbed two banks, killed a police informant and tried to derail a police train.





After being captured in a dramatic shootout wearing his famous armour, Kelly was tried by Barry for the murder of one of the policemen at Stringybark Creek.



Kelly was tried by Barry for the murder of one of the policemen at Stringybark Creek. Barry orchestrated the trial outcome: ruling as inadmissible Kelly's 'Jerilderie' letter, so the jury did not know Kelly acted in self-defence. He misdirected the jury so that the lesser charge of manslaughter could not be considered. By only allowing the options of murder or acquittal, a sentence of death was inevitable. Barry and Kelly had a heated debate during sentencing, with Kelly telling Barry, 'we shall all go to a bigger court than this' and 'I will see you there, where I go'. The words were a curse, as 12 days after Kelly was put to death by hanging, Barry died (supposedly from a carbuncle on the neck).

Unfair trial? Perceived issues:

- Judge allowed prejudicial evidence (of Kelly's other crimes)
- Biased judge? Oral tradition – Barry's words at the trial of Kelly's mother
- Judge denied the Defence's request for more time to prepare
- Judge's directions to the jury were favourable to the prosecution:
 - Ruling out the lesser charge of manslaughter when some evidence suggested Kelly acted in self-defence
 - Didn't leave it to the jury to decide whether the police were intending to make a lawful arrest or to shoot Kelly (judge usurped the jury's role as trier of fact)
- Rushed proceedings

Unfair trial? – Perceived issues not related to the judge

- Trial moved from Beechworth to Melbourne
- Inexperienced counsel
 - Failure to challenge witnesses – particularly the key crown witness MacIntyre (PIS – original statement says Kelly shot in self defence, testimony at trial was that Kelly shot in cold blood)
 - Poor choices – eg. Objected to the admissibility of the Jerilderie letter (Kelly's version of events; self defence)
- Ned's side of the story not given:
 - Inadmissibility of Jerilderie Letter
 - Defendant unable to give evidence
- Questionable validity of warrant held by police at Stringybark Creek (Fitzpatrick dismissed from police force for being a 'liar and a larrikin').
- Expiration of the *Felons Apprehension Act* (double jeopardy – can't be tried for a crime for which you have already been deemed guilty)

Perceived unfair aspects of the trial were revealed much later

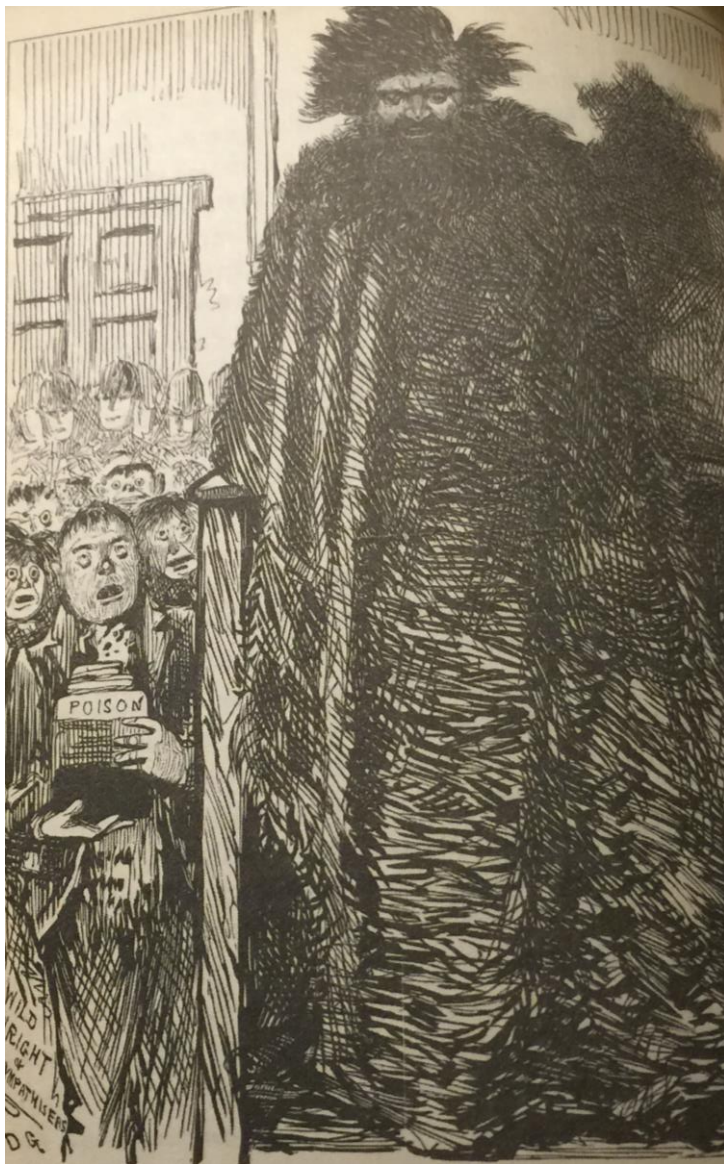
- 1881 – Royal Commission into the Police Force – policeman who claimed Kelly shot him in the wrist a “liar” – **Kelly arrest warrant based on lies?**
- 1913 – John Sadler, *Recollections of a Police Officer* – quotes MacIntyre’s **original statement** (Perjury at Kelly’s trial? PIS).
- 1929 – J J Kenneally, *The Inner History of the Kelly Gang* – one of the first books to be openly **sympathetic to the Kelly cause** (police persecution; forced outlaw)
- 1930 **Jerilderie letter** published (Kelly’s account – self-defence)
- 1948 – Max Brown *Australian Son* – *Jerilderie Letter* widely disseminated
- 1968 – Professor Louis Waller, ‘Regina v Edward Kelly’ in Colin F. Cave *Ned Kelly: Man and Myth* – **Outlines Barry’s failings in the trial**
- 1987 – John Phillips *The Trial of Ned Kelly* – **Self-defence arguable. Critical of Barry's directions to the jury. Critical of Defence lawyer’s performance.**
- 2005 – Alex Castles *Ned Kelly’s Last Days* – **Expiration of Felons Apprehension Act prior to Kelly’s trial (Kelly shouldn’t have be tried for a crime he was deemed guilty – double jeopardy)**. Critical of government officials’ treatment of Kelly post capture.
- 2007 – Graeme Fricke *Ned's Nemesis* – Argues in favour of self-defence. Highlights the rivalry between Kelly and Barry.

3. How is Judge Barry Portrayed in images of the Ned Kelly Trial? Is it shown as an unfair trial?

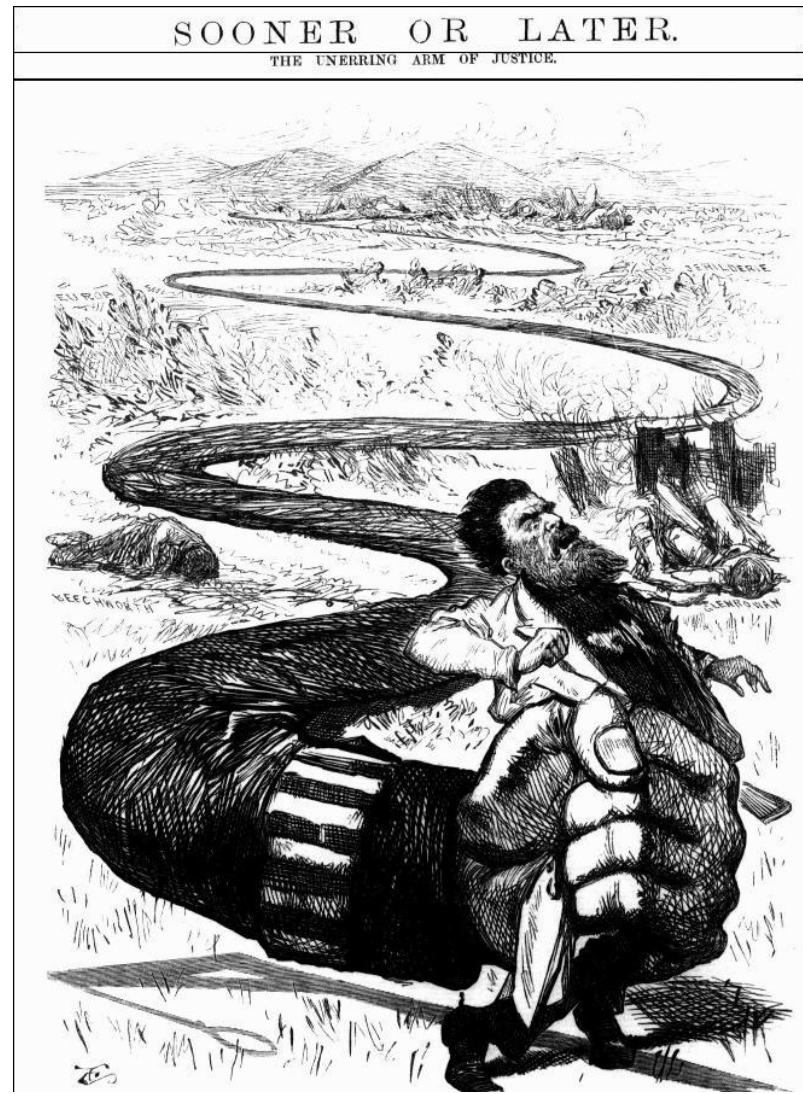
The first images of the Kelly trial were favourable to Barry and unfavourable to Kelly. Later, the reverse happened.



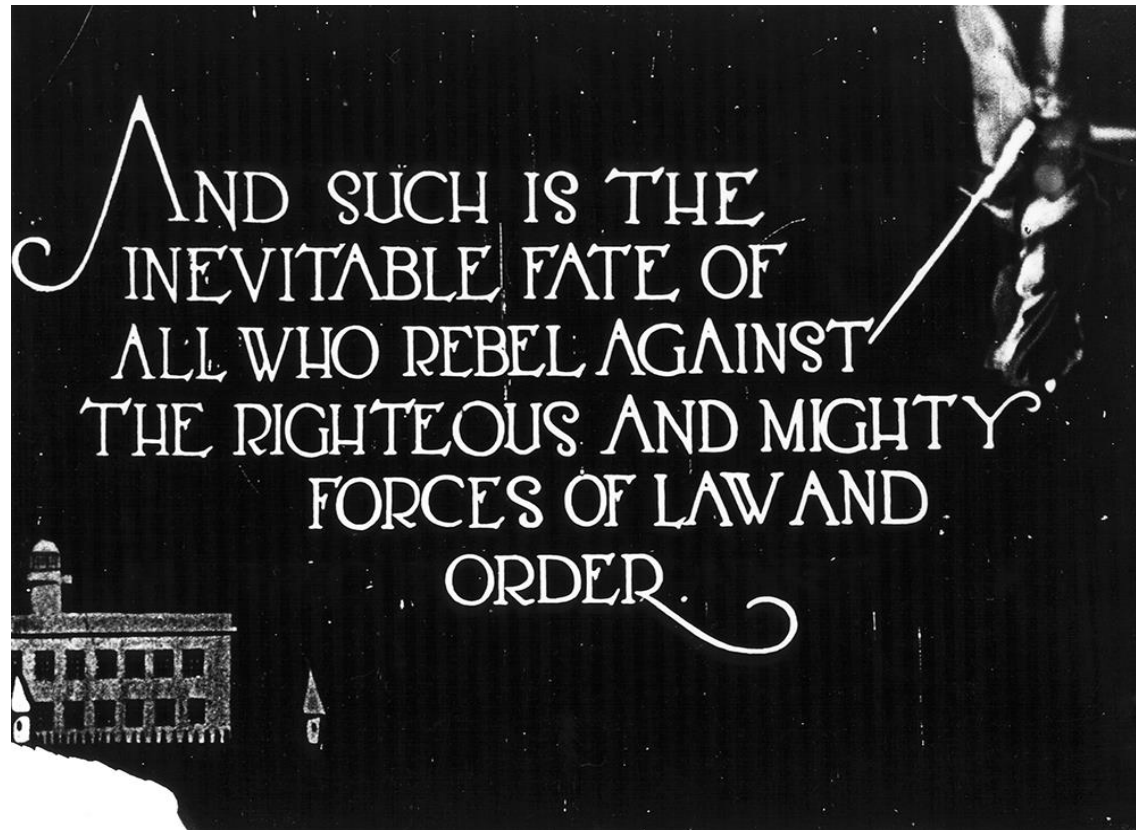
‘Trial by jury was a mere formality.’ ‘No judge could hold the scales of justice more evenly, and with so much impartiality, as his Honour Mr Justice Barry.’



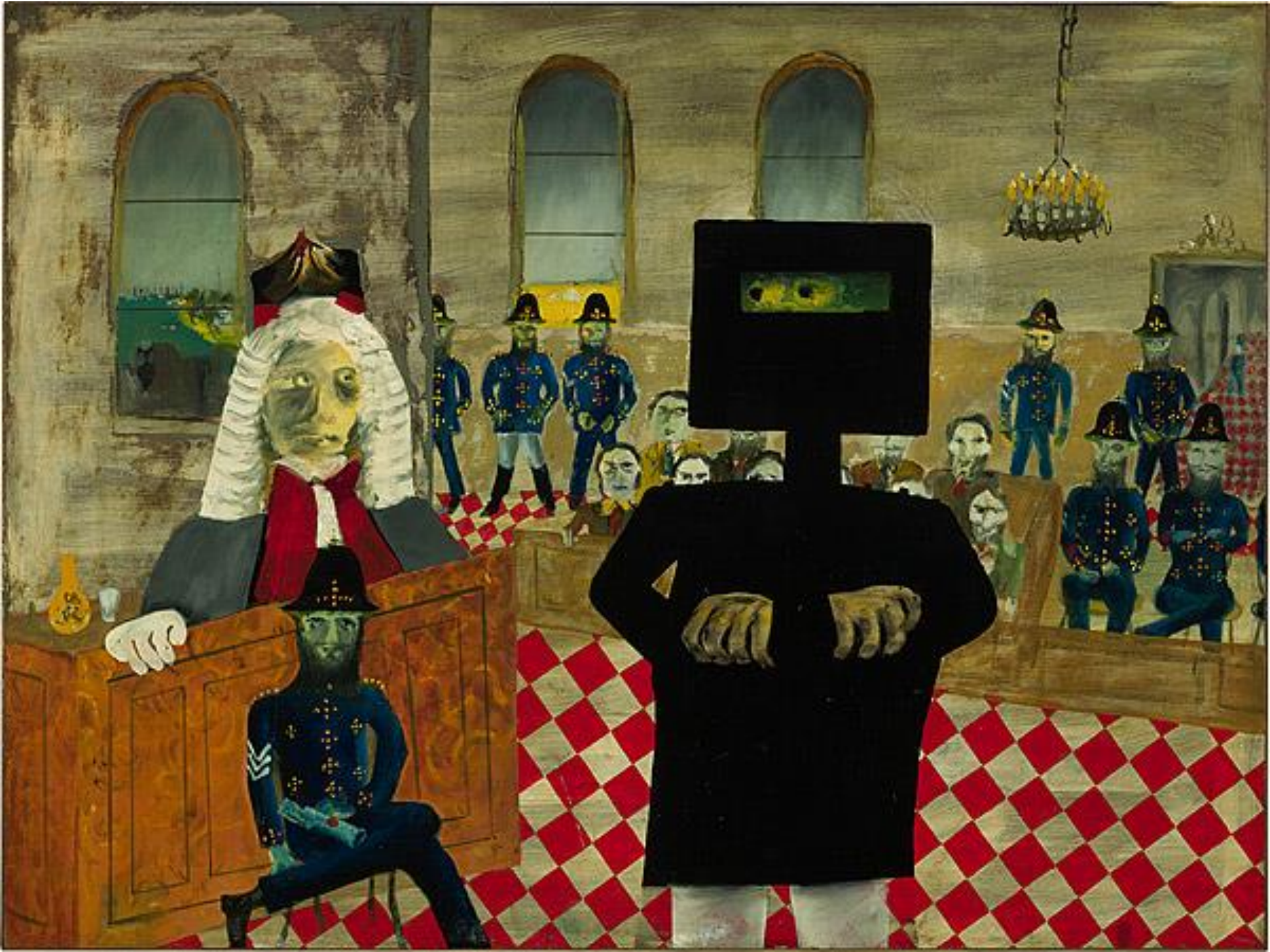
Ned Kelly in the
Dock



The unerring
arm of justice



Intertitle following Barry sentencing Kelly to death in the silent film *The Kelly Gang* (1919)





Robert Cover: 'the judge's words do violence. A judge articulates [his or] her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life... When interpreters [i.e. the judges] have finished their work, they frequently leave behind victims whose lives have been torn apart by these legal, organised, social practices of violence, especially when handing down a punishment.'

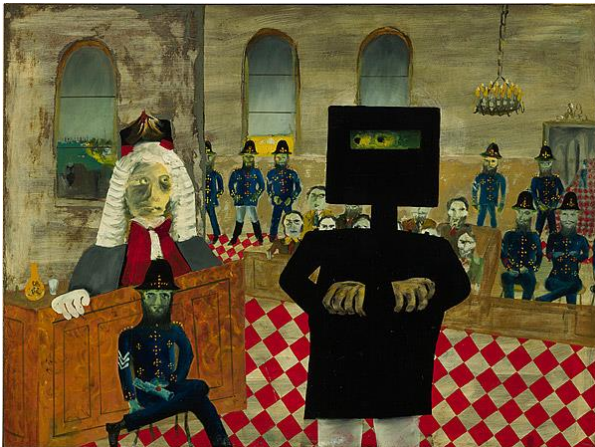
Comparing *The Trial* with Dowling's portrait of Barry



Louis Marin: 'signs of force... need only be seen as force to be believed.'

'the representational framework [of portraits] operates the transformation of force into potential... It carries out the substitution for the Exterior act...'

- Barry's portrait asserts judicial power. The portrait shows 'signs of force' but does not show Barry wielding judicial force. Barry is not in court.
- Nolan's portrayal of the Kelly trial does the opposite – it challenges judicial power. Unlike a portrait, it shows what Marin refers to as the 'exterior act, where a force is manifested'. Kelly is shown as another force challenging Barry's judicial force.





The subtitle to Nolan's artwork quotes the words said at the end of history-Kelly's trial:

'Judge Barry then passed the sentence of death,

And concluded with the usual formula:

'May the Lord have mercy on your soul.'

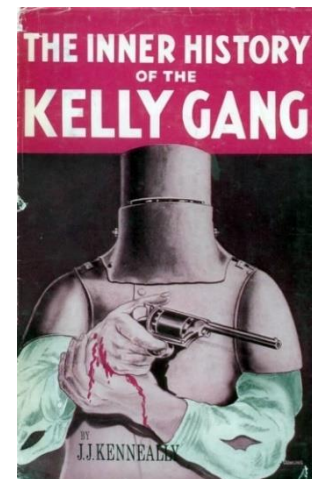
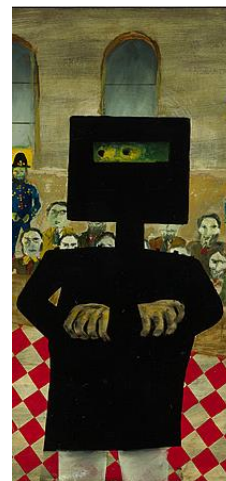
Ned Kelly: 'Yes, I will meet you there.'

Is there another layer of meaning in this artwork? Is it also *Barry's* trial?

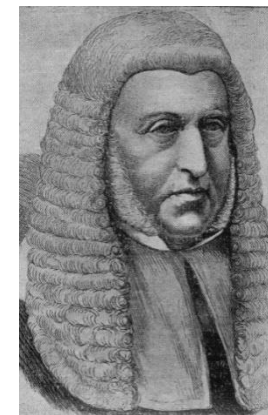
- The courtroom is not in Melbourne – it's by a beautiful seashore. Nolan often references Kelly music in his artworks – could this be a reference?
- Religious allusions – Is this a 'higher court?'
- Why are the jurors faces entitled 'face of a bushranger' in Nolan's sketches?
- Is Barry in a witness box?
- Is Barry a witness being questioned by Kelly?

Kenneally argues:

- The police and judiciary ‘metaphorically speaking, intended to use LOADED DICE to rob the Kelly family of their FREEDOM.’ He asserts trial outcomes were orchestrated.
- He lists a number of unfair aspects of Kelly’s trial. The biggest criticism of Barry, however, relates to Ellen Kelly’s trial, where Kenneally’s Barry expressed an opinion that, if present, Kelly would have been sentenced to 15 years for the attempted murder of Constable Fitzpatrick. The book says Barry’s:
‘vicious promise to give Ned Kelly fifteen years... [was] the originating cause of the Kelly outbreak. Ned Kelly decided to fight [instead of going to gaol for a crime]... he was already “convicted” by a judge, although he had not then been arrested nor had he been tried.’
- Kenneally says Barry’s:
‘threatened sentence of fifteen years... was responsible for the deaths of [the] ten persons [killed by both sides in the Kelly Outbreak]... Kelly’s challenge, therefore, to meet Judge Barry where they both would get unadulterated justice was very significant, seeing that Judge Barry was so promptly called to answer that challenge.’



Comparison of Nolan’s Kelly with the picture of Kelly on the cover of J. J. Kenneally’s book *The Inner History of the Kelly Gang and their pursuers*

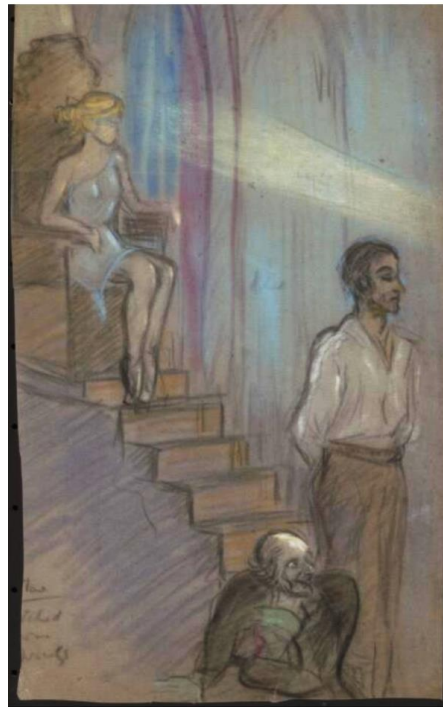


Comparison of Nolan’s Barry with the picture of Barry in J. J. Kenneally’s book

Divine Judgment



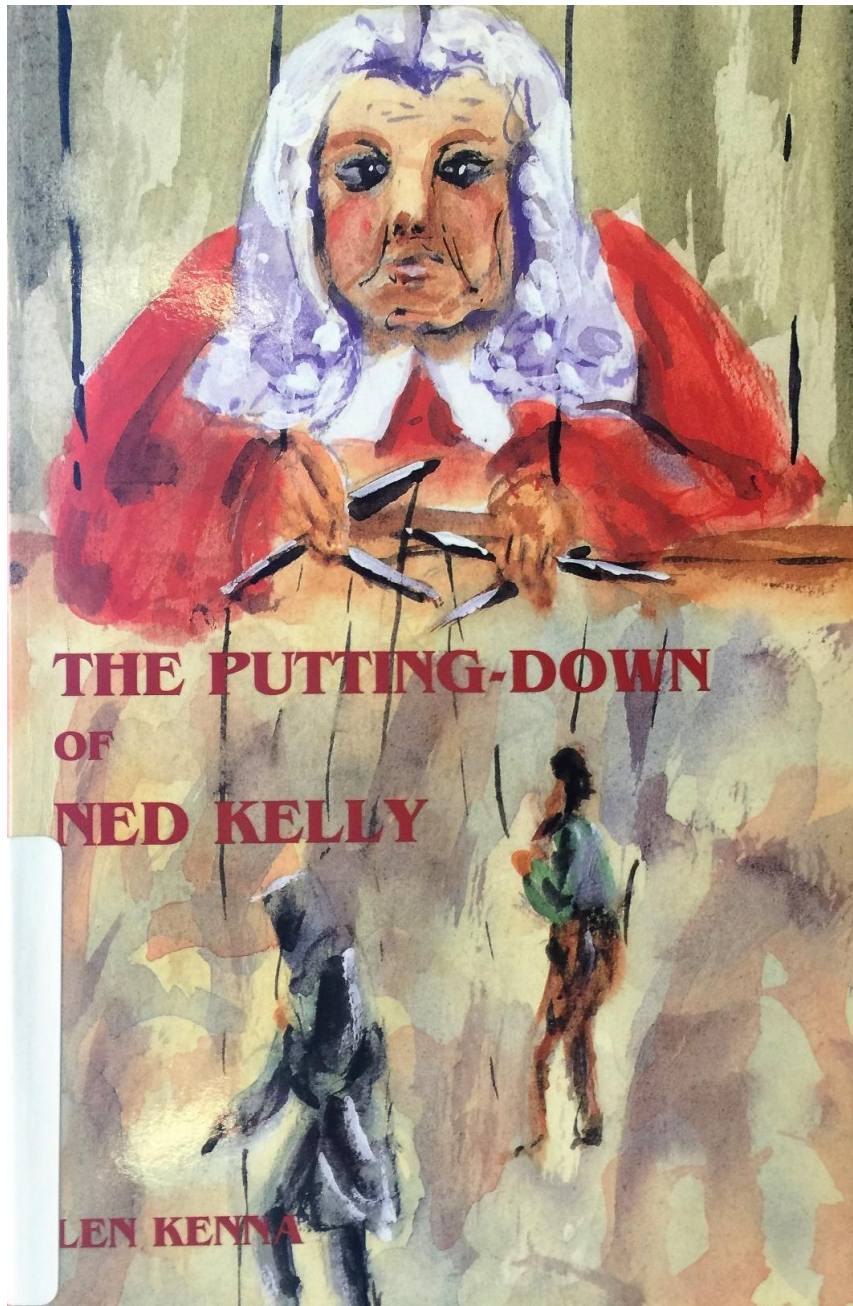
‘The verdict of the higher court, mentioned by Ned at the time of his trial has, to this date, never been released to the public.’



‘Did Ned stand a fair trial or was the Court biased?... Justice places herself undeniably on Ned's side.’



The closing shot is a freeze frame: “I’ll see you... there” as Kelly points down to hell.

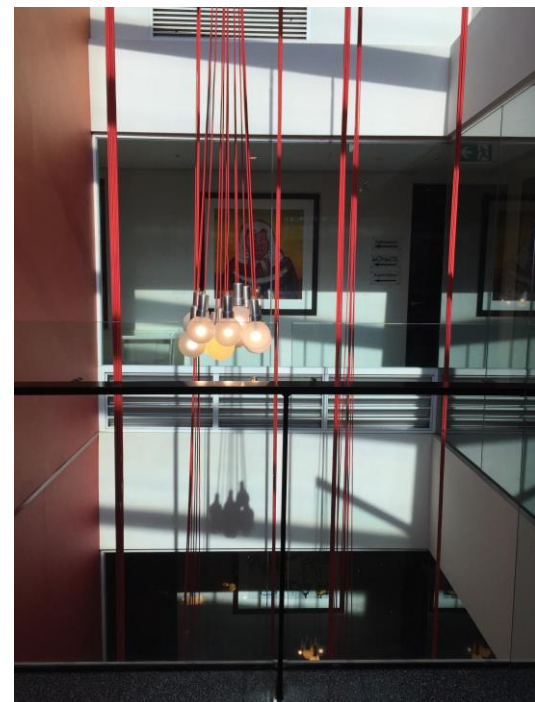


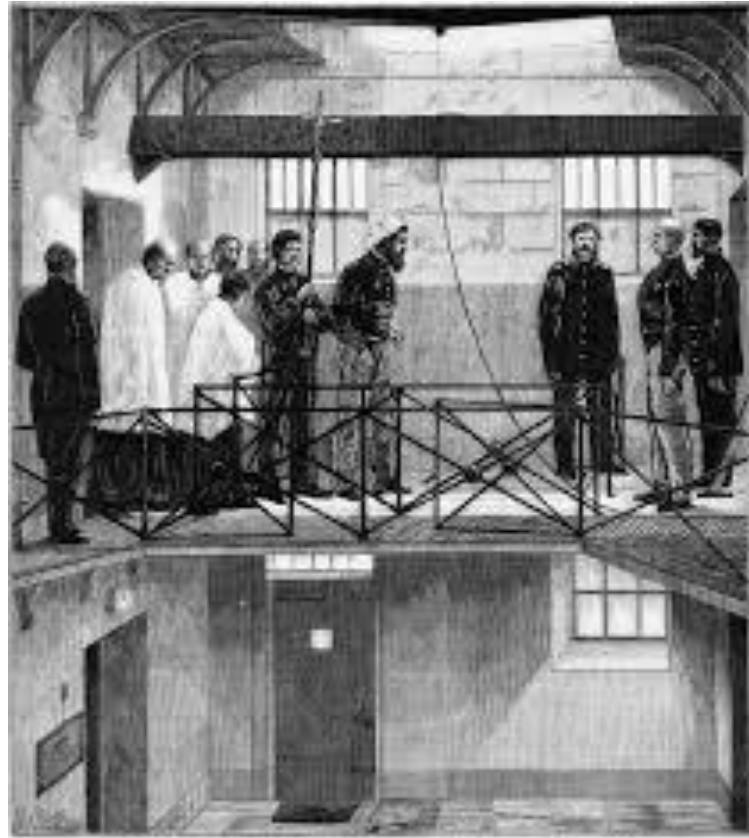
Book cover showing Barry as a puppeteer, controlling Kelly's fate.





‘His use of dripping paint is consistent throughout his art. The effect leaves an impression of sadness that would associate with images of melting, rain, blood or tears.’





WHAT WERE ON THE BALCONY, THE OFFICIALS OF THE PRISON.

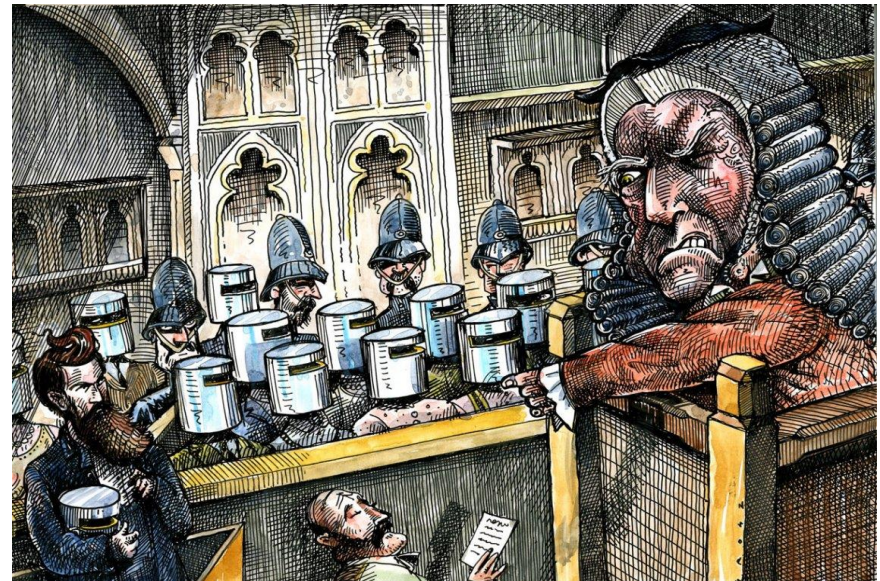


Kelly in a green vest.
Actor describes Barry as Kelly's
'nemesis' and says 'in his eyes
Kelly was a bog Irish vandal.'

The public are depicted in
Kelly's armour and
metaphorically on Kelly's 'side'



Barry signs the papers that condemn
Kelly to death, but he worries he is
making a martyr out of Kelly. 4. Barry
makes a dying speech asking that his
family be told 'I took a rebel with me.'



Moral Judgment

‘Ned Kelly was found guilty, legally. Was he guilty morally?’

Ian Jones reimagined Kelly as an Irish rebel. He stated Kelly’s:

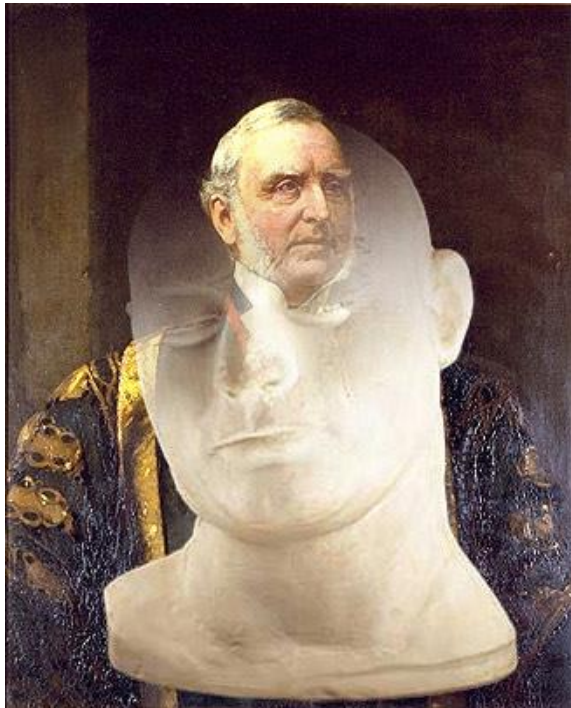
‘revolt against personal injustice had become linked with the broader struggle of the embattled Irish selectors in the North-East [a land war between squatters and selectors]... we are not watching a murder trial but an Irishman who could free Victoria being paraded through a hollow ritual of British justice before being led to his execution... the essence of the Kelly story is Irish rebellion against British authority. And that the trial is concerned with Ned Kelly’s first blow against the forces of the Queen, by shooting three members of a police party sent out to capture and kill him.’

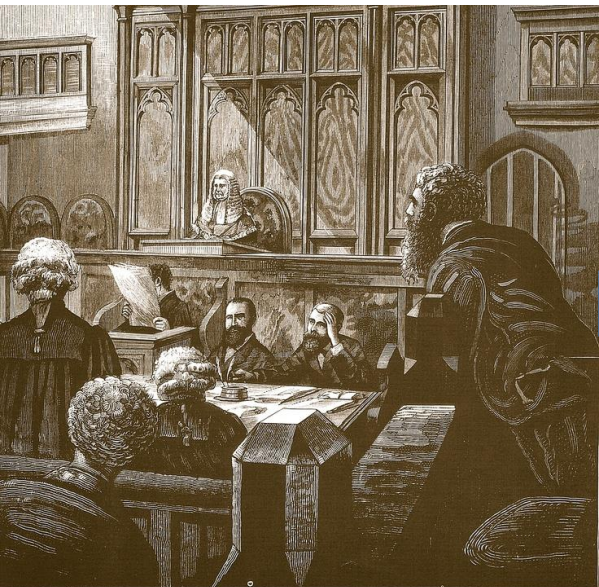
Jones was the first to argue that Kelly planned to create a Republic of North-East Victoria.

- Kelly's remark that 'we will all go to a higher court' is similar to the words of the famous Irish rebel Robert Emmett: 'we must appear... at one common tribunal.'
- In the Irish Rebel tradition, 'it is in courts of justice... that the lessons of morality are best taught... But it is not from the bench... venality, passion, and prejudice have but too often swayed the decisions...' Judges were 'the representatives of the government whose oppression had driven them [the rebels] to revolt.'
- Court proceedings of Irish rebels were described by Sullivan as 'the solemn farce of trying them for a crime which posterity would account a virtue.'

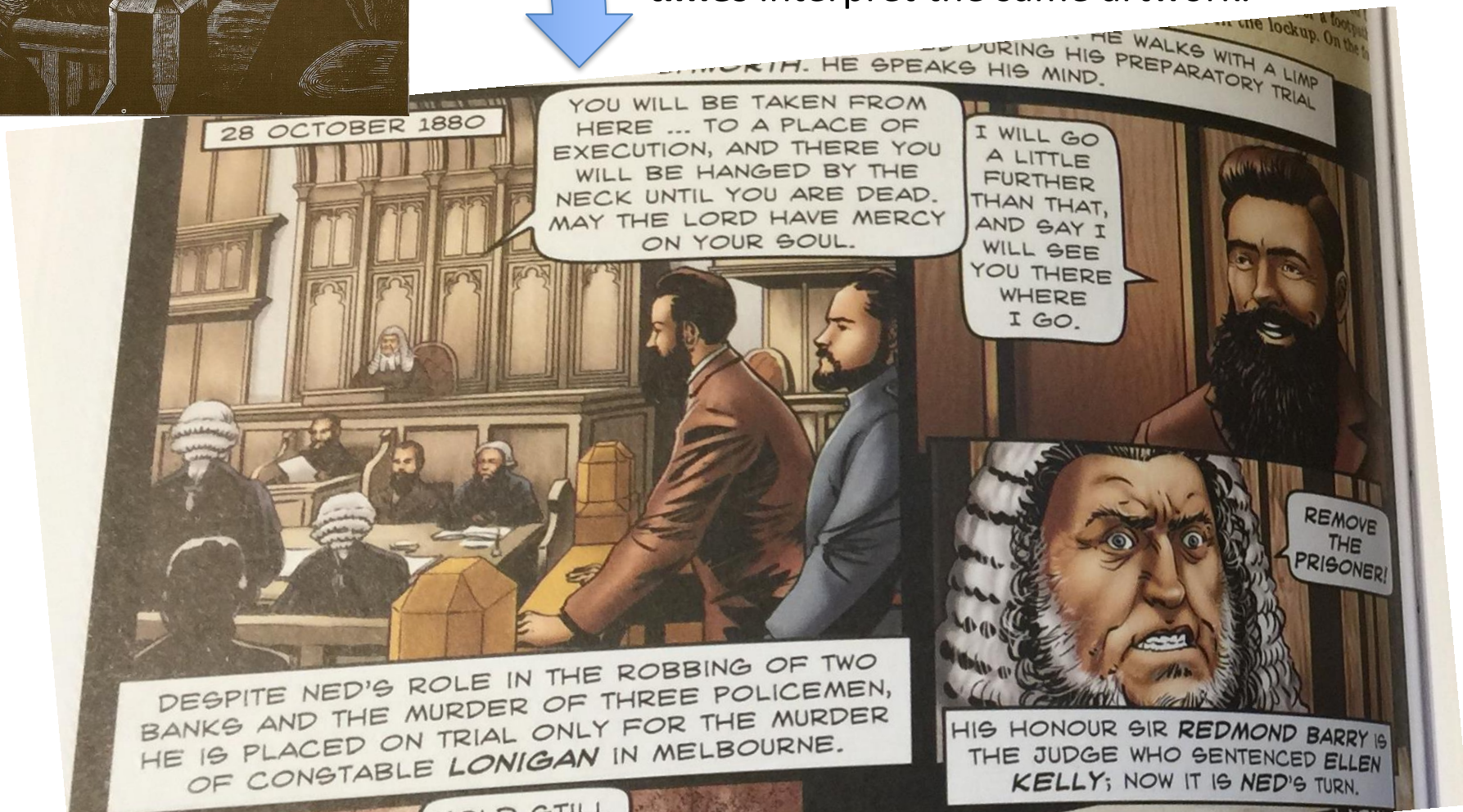
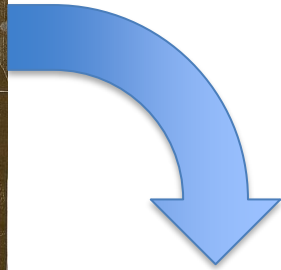
4. Impact of the Kelly story on images of Barry

Pro-Barry images began to be interpreted differently (not positively, but negatively).





Mieke Bal: 'even the most "historicist" account of a work of art is rooted in an encounter with the work in the present.' Bal says to not merely consider how the audience of the time would have interpreted an artwork; consider how **audiences in different times** interpret the same artwork.



So many images 'of an individual provide the viewer with an opportunity to experience the character portrayed in depth and from different points of view, an experience comparable, in its way, to reading several biographies of a famous person. However, such an abundant repertoire of images may also **present the viewer with a confusing range of options, destabilising the characterization of the person portrayed** and obscuring the mental image of the subject.'

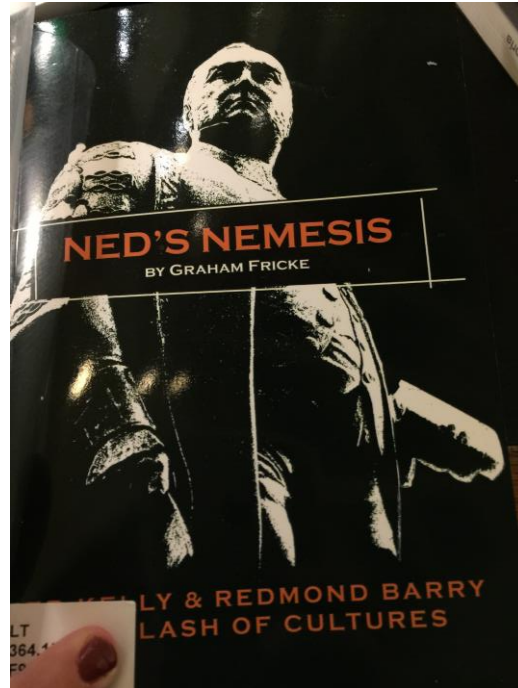


‘The statue is of heroic size, being 10’ high and the deceased judge is represented in his Chancellor's robes, with the order of St. Michael and St. George and other insignia. The attitude is dignified and commanding... [It is] the finest specimen of bronze casting which has ever reached the colony. It may be mentioned that it is the first statue cast in one piece that has been procured for Victoria.’



9/10

The Judge R. Amis 5/02



Reactions to Barry's official statue on the forecourt of the State Library of Victoria:

1897:

'Such is fame.

Two men from the country were standing at the gates of the Public Library, admiring the bronze statue of Sir Redmond Barry.

'Who was that cove, Bill?' asked Jim.

'What! Don't you know him? Well, you are an ignorant begger. That's **the covey what hung Ned Kelly.**'

2015:

High school students are loitering around the statue of Redmond Barry that presides over the forecourt.

A boy ambles over.

"So who's this dude, then?"

"A judge," says one of the girls.

"**He hanged Ned Kelly,**" volunteers another.

"How come the arseholes always get the statues?" says the boy.

- Statue plinth: **‘Erected by a grateful public to perpetuate the memory of invaluable services rendered to Victoria by Sir Redmond Barry Kt, Doctor of Laws, and a judge of the Supreme Court, OBIIT MDCCCLXXX’**
- In 1980, to mark the centenary of Redmond Barry’s death, a second plaque was added to the plinth on which his statue so proudly stands outside the State Library of Victoria. The inscription gives rather stern notice that the statue should **‘remind the people of Melbourne of the benefits they continue to receive from the vision and enterprise of this great man.’**
- 1980 wasn’t only the centenary of Barry’s death, but also Ned Kelly.
- ‘Barry must be grinding his bronze teeth that Kelly’s armour and death mask is in the library.’



According to Peter Goodrich, a key aspect of good judgment is that a judge must be represented as 'above those who the rules are addressed' This Speech has taken us on a journey across 138 years of Barry's visual traditions, and identified there was a turning point in later representations that meant Barry was no longer represented as 'above' Kelly.

5. Has Barry been misjudged?

Questioning the underpinnings of anti-Barry images

Are the criticisms of Barry's performance at Kelly's trial unfair?

Rebuttals to criticisms of Barry:

- Judge allowed prejudicial evidence (of Kelly's other crimes) – **Legal Historian Louis Waller states Barry was legally correct to allow this evidence (including evidence re. Scanlan and Kennedy's death).**
- Biased judge? Oral tradition – Barry's words at the trial of Kelly's mother – **CJ Phillips says there's no evidence Barry said this. These are assertions made by Kenneally 50 years after Kelly's death.**
- Judge denied the Defence's request for more time to prepare – **Legal historians discovered that it was the third request for an adjournment by the Defence.**

- Judge's directions to the jury were favourable to the prosecution:
 - Ruling out the lesser charge of manslaughter when some evidence suggested Kelly acted in self-defence
 - Didn't leave it to the jury to decide whether the police were intending to make a lawful arrest or to shoot Kelly (judge usurped the jury's role as trier of fact)

Legal commentator Jeremy Stoljar disagrees: 'If [Kelly's lawyer's] did abandon the self-defence argument, one can hardly criticise Barry for not putting it to the jury.'

- Rushed proceedings – **Legal Historian Louis Waller states the trial was considered lengthy for its time (2 days).**
- Barry objected to the Jerilderie Letter, meaning the jury didn't know Kelly's side of the story (self defence) - **CJ Phillips clarified it was the Defence who objected to the admissibility of the Jerilderie Letter. Not Barry.**



Other aspects misrepresenting history?

- Kelly did not say he would meet Barry at a 'higher' court (this remark was directed at the witnesses Kelly perceived to be liars).
- Kelly said 'I will see you there' to others, including Kelly's sister, but those interactions were not considered a curse.
- Barry had been ill before Kelly's trial, so his death was not a prophecy fulfilled.
- Barry had no offer from Kelly for his mother to be freed in exchange for him (the offer was made to Police Magistrate Alfred Wyatt).
- Barry's reputation as a hanging judge is unsupported by death penalty statistics.
- Barry's remarks to Kelly, following sentencing, were not unusual for the time. Similar words were used by judges in other bushranger trials. Whether Kelly was an Irish Rebel who sought to establish a republic is subject to heavy debate.
- While Kelly's Irish identity explains some things, it's impact on Kelly's trial may be overstated. It was not a treason trial, it was a murder trial.

Note: History-Kelly barely mentions Barry.

Recap

- Artworks not connected with Kelly story –
 - Barry as a ‘sage of the law’ in his judicial portrait - wise judgement.
 - Caricatures – pompous, bossy (falling short of the ideal judge) but lighthearted and not hostile (humanises Barry)
 - Lack of family portraits – connection between personal behaviour and judgement.
- Artworks of Ned Kelly story – portrayal of Barry changed when Kelly’s side of the story became known. Barry went from being ‘the unerring arm of justice’ to an unjust ‘hanging judge’.
- Impact of the Kelly story on artworks not connected with the Kelly story – shows the potency of the Kelly story (it can mean an artwork is interpreted differently to how it was intended).

Overarching themes across the artworks

- Art as a way to subvert, question and challenge
- A clash between official and popular conceptions of the same judge, therefore creating a dialogue from 'the top down' as well as from 'the bottom up'
- Images reveal attitudes towards the sitter.
- A rich mosaic of images make up our legal history.

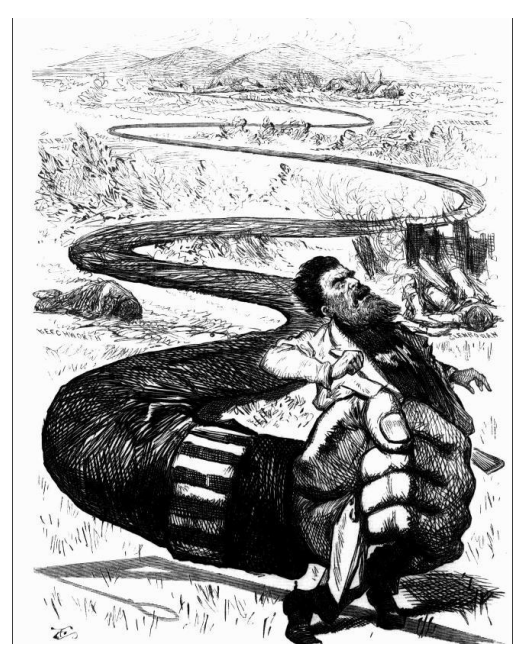
Questions



Sage of the law



Shown in a good 'light' at trial



'The unerring arm of justice'



The court is a loaded dice



WANTED for aiding and abetting a hanging



Mug shot
Alice Richardson