REVIEW

Popular Visions of Law

Criminal Law and Colonial Subject: New South Wales 1810-1830
Paula Byrne,
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Bruce Kercher

This book "looks at the way in which the practice of law developed among the ordinary population" (p 6). It argues that "[o]rdinary people, convict and free, made their own law; they mapped their own boundaries of legality and illegality" (p 2). The book is based on a study of almost 6000 records of criminal court cases heard in New South Wales between 1810 and 1830, most of which were depositions, verbatim transcripts of the evidence of witnesses. Dr Byrne brings a sophisticated theoretical analysis to bear on this vast collection of sources. In the introduction, she particularly acknowledges the influence of anthropology and its sub-branch, ethnography. Her aim is not to use the court records as a representation of social life or the attitudes of common people, but to draw out "the dynamic relationship between people and law" (p 9).

Byrne is not concerned about the way in which formal, positive law is made, but the way in which it is experienced and influenced by a multiplicity of players. Since *Albion's Fatal Tree* was published in 1975, historians have shown an increasing interest in the legal ideas of common people, boosted by the recent publication of E P Thompson's *Customs in Common*. Hartog showed in 1985 for example, that the pig keepers of nineteenth century New York were not merely obstinate when they refused to obey the laws against

keeping pigs in the streets. Like Thompson's food rioters, they were asserting what they claimed to be a customary right.[1]

The actions of colonial Australians were often based on similar expressions about their normative beliefs. In the first thirty years in New South Wales people frequently ignored the governors' orders on the conveyancing of land and the formal requirements of making promissory notes. It was then up to the courts to reconcile official and popular versions of law.[2] The same occurred in land law, when squatters ignored government limits on where they could graze their stock. This was the greatest law-breaking in Australian history, seen at the time as vast trespassing on crown land, but since *Mabo* as a mass invasion of native land. The same kind of assertion of legal beliefs was expressed through the actions of those who killed Aborigines. The New South Wales Supreme Court made clear in *Murrell's case* in 1836 that Aborigines were entitled to the protection of the law,[3] yet the Myall Creek massacre occurred two years later, followed by many other atrocities. The popular assumption was that Aborigines were lesser beings, who could be slaughtered with impunity. Talking about squatting, James Stephen, the legal man at the Colonial Office, recognised the impossibility of controlling broadly held popular beliefs about law:

> In the remoter part of the vast region comprised within the range of the Australian colonies, the power of the Law is unavoidably feeble when compared with the predominant inclinations of any large body of the people. ... The case of Port Phillip is but an example and illustration of the prevailing triumph of popular feelings over Positive Law.[4]

Byrne makes a more subtle argument when she shows how people asserted their ideas in court. She is particularly concerned to discover conflicting meanings of legal and social terms. In chapter 2 she studies the notion of work in a convict society which was gradually being transformed by an increasing number of free and emancipated people. Despite their apparent dependence, assigned convicts had their own views of the conditions under

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1 H Hartog, "Pigs and Positivism" [1985] *Wisconsin Law Review* 899.

2 B Kercher, *The Development of Law in the New South Wales Court of Civil Jurisdiction, 1788-1814*, PhD thesis, Macquarie University, 1992, chap 5.

3 *R v Jack Congo Murrell* (1836) 1 Legge 72.

4 S Roberts, *The Squatting Age in Australia 1835-1847*, 1935, reprint Melbourne University Press, Melbourne, 1964, pp 82-83.

which they ought to work, which they propounded in court. When masters brought convicts before the magistrates on charges of disobedience for instance, the convicts often based their defence on the inadequacy of the rations or housing supplied by the master. In these cases, there was a confusion of convict discipline and master and servant law, with a local colour which was quite different from that in Britain. The law of New South Wales, Byrne argues, played a major role in modernising the employment relationship as well as gender relations.

Her large source base allows Byrne to show the great variety of convict experiences in early New South Wales. In the countryside, plantation conditions applied and the master and servant relationship was paternalistic, whereas in the towns the conditions were closer to that of wage employment. There was also a distinct difference in both popular and official perceptions between the roles of male and female convicts. Men were valued for their work and women for their sex. This did not mean that the women were passive; they manipulated the disciplinary rules to get away from unwanted assignments and back to the relative autonomy of the Female Factory. Like men, they used the law to their own ends even when it was loaded so heavily against them.

Women used the courts differently from men, says Byrne. Theft among them was more likely to be personal, while it was usually anonymous among men. Disputes between female lodgers and their landladies, for example, often led to prosecutions for theft. The courts became arenas of personal disputes, sites in which women waged personal vendettas. The law was not so much used to resolve these conflicts as it was drawn into them. Men too were sometimes involved in interlocking disputes: one of the book's informative charts shows an astonishing chain of assault and theft cases in which 19 people were locked together in accusations and counter-accusations (p. 252).

Byrne shows there were similar conflicts and convergences of official and popular views over bushranging and policing. Policing varied from place to place, as did the actions of the magistrates. Bushranging was the product of both magistrates and the bushrangers, and led to a particular type of policing and reactions to it. The law did not stand outside these events, but was an integral part of them and popular culture generally.

Byrne's main argument is that the "legal system in practice was made by the intermeshing of statute law, magisterial power and popular attitudes" (p 124). In doing so, she gives us a rich view of illegal punishments by the

magistrates, confusion over the difference between the rights of convict and free people, disputes between official and unofficial perceptions of law, and important regional variations even within New South Wales. This was not just a region of England, she says. The convict experience entered many areas of colonial life, and it altered the nature of authority in the colony. Byrne's work began as a PhD thesis, and it has been reworked into a compelling book, enhanced by dozens of stories which only close archival work can reveal.