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## ***AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA***

**Bruce Kercher**

Allen & Unwin, St Leonards 1995

xxi; 248pp

ISBN 1 86373 891 6

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## ***THE INVISIBLE STATE: THE FORMATION OF THE AUSTRALIAN STATE 1788-1901***

**Alastair Davidson**

Cambridge University Press, Cambridge 1991

xvii; 329pp

ISBN 0 521 36658 5

**I**N both *An Unruly Child*<sup>1</sup> and *The Invisible State*<sup>2</sup> the role and development of law in Australia are contextualised against Australian social history. Depicted against the backdrop of law are Australia's convict past, the Myall Creek massacre, the Eureka stockade, the Torrens land title system, white male suffrage, bushranging, the gold rush, the growth of companies, the building of railways, the White Australia policy, labour disputes, unemployment, the Depression, and the development of university legal education. Yet, despite their similar themes, *An Unruly Child* and *The Invisible State* contain radical differences in their approaches not only to history, the state, and to legal reasoning, but also to discrete historical events.

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1 Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, St Leonards 1995).

2 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* (Cambridge University Press, Cambridge 1991).

## AUSTRALIA'S UNRULY CHILDHOOD

Kercher himself describes his aim in *An Unruly Child* as being to "chas[e] the sometimes elusive local quality in Australian law, from 1788 until the High Court's 1992 *Mabo* decision and its aftermath".<sup>3</sup> This occurs in three distinct phases, corresponding to the three parts of the book, "Frontier Law", "Imperial Orthodoxy" and "Federation: Deference and Independence". His broad thesis follows this schematic outline, being, as defined by Justice Michael Kirby, "that, legally speaking, Australia began creatively enough, became an abject copier of the English and is now becoming more creative again."<sup>4</sup>

Kercher's first phase is represented by the case of *Kable v Sinclair*,<sup>5</sup> the first civil action in Australia, in which the common law rule of felony attain was ignored, and a neat local fiction invented.<sup>6</sup> This case is seen as indicative of the new form that the imported common law took on in Australia; "the rule of law had a different meaning under the gum trees".<sup>7</sup> The second phase described by Kercher was precipitated by the growing maturity of the legal system. English judges were imported and "began the process of replacing a cheap, easily comprehended system with an expensive one based on the obscure learning and craft of England".<sup>8</sup> This "obscure learning" involved a new deference to the strict legality of the doctrine of precedent which meant, "in structure at least, a closer adherence to English precedents".<sup>9</sup> The result, Kercher argues, was a paradox because "the internal and external legal colonialism of the judges increased over time, rather than decreasing in line with the growth of legislative independence".<sup>10</sup> The third and final phase of this development has occurred since Federation, with a gradual growth towards a more innovative and active legal system.

Kercher is concerned with the way in which peculiarly Australian circumstances moulded Australian law, and also with the way in which the law itself moulded Australian social history. He considers the impact of

3 Kercher, *An Unruly Child: A History of Law in Australia* p ix.

4 At p i.

5 (Unreported, Court of Civil Jurisdiction in NSW, David Collins JA, 1 July 1788).

6 Kercher, *An Unruly Child: A History of Law in Australia* pp22-23.

7 At p42.

8 At p49.

9 At p73.

10 At p93.

law on convicts, women, labourers, Aborigines, debtors, squatters, emancipists, exclusives and immigrants. He discusses not only the superficial development of legal and judicial independence, but also the factors that influenced this development and the impact that the changes involved in this development had on different sections of the Australian community. In this way his book is filled with the rich texture of individual personality, interpersonal relations, the emotional and financial plight of individual colonists, and the ambivalent and rocky relationship between the imperial parent and her "unruly child".

### THE INVISIBILITY YET UBIQUITY OF LAW

Davidson's thesis is that the law is "the invisible power within the State".<sup>11</sup> Davidson paints a bleak picture of the Australian citizen, "cap in hand",<sup>12</sup> "chloroformed in a fateful indifference"<sup>13</sup> to their "voluntary tutelage".<sup>14</sup> The law denies the Australian people sovereignty, claims Davidson, and the irony is that the Australian people consent to this law.<sup>15</sup>

Davidson describes the early Australian state as a totalitarian police state based on surveillance. The Australian colonies were the most policed areas in the British world and the convicts were "like flies under glass".<sup>16</sup> The feeble attempts the citizens did make to object to this command system served only to seal their disempowered fate. They sought refuge in the law, demanding legal rights and legalism. This appeal to the protection of the law allowed the judiciary to step in as the invisible power,<sup>17</sup> since judges who rule on legal rights can control the form of the state.<sup>18</sup> Davidson refers to "the usurpation of political power by the court", and to the "court's right to have the last word about political and ethical matters" as "their hidden political power".<sup>19</sup> Thus, unlike Kercher, who, through *Kable v Sinclair*, sees an initial period of innovation in "Frontier Law", Davidson takes different examples and states that, "in

11 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* p xv.

12 At p xiv.

13 At p 241.

14 At p 225.

15 At p xvi.

16 At p 40.

17 At p 121.

18 At p 142.

19 At p 144.

cases like *Crossley v Smyth and Wentworth*<sup>20</sup> and *Boston v Laycock*<sup>21</sup> the Governor indicated his intention to follow the common law."<sup>22</sup>

Davidson, whose thesis is strongly Foucauldian,<sup>23</sup> not only questions the role that is traditionally attributed to the law in society, but also examines the impact that this has on the way the people conceive of themselves in terms of the state, and the implications that the peculiar role of law in Australia has for responsible government and democracy in this country.

### JUDICIAL POLITICAL POWER

Kercher, in writing *An Unruly Child*, had evidently read Davidson's *The Invisible State*, and indeed Davidson appears in references on several occasions.<sup>24</sup> Significantly, he agrees with Davidson that judges have considerable political power. Kercher sees the political role of judges in the context of his broad attempt to juxtapose English conservatism with Australian innovation: the doctrine of repugnancy, for example, was an attempt to impose English conservatism on Australia, and the result was the "very non-English notion that judges could decide on the validity of legislation".<sup>25</sup> Kercher even concedes that this political role continues today, noting:

The unelected judges of the High Court regularly amend the constitution, through changing their interpretation of its words. ... They are at the centre of public life in Australia.<sup>26</sup>

However, Kercher does not regard this political role as necessarily problematic. Rather, judges change the common law "to meet current Australian values and needs",<sup>27</sup> and they adapt the Constitution "to their perceptions of its meaning and their notions of Australian needs".<sup>28</sup>

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- 20 (Unreported, Court of Civil Jurisdiction in NSW, Richard Atkins JA, 1804).  
 21 (Unreported, Court of Civil Jurisdiction in NSW, David Collins JA, 11 December 1795).  
 22 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* p123.  
 23 At pxii.  
 24 Kercher, *An Unruly Child: A History of Law in Australia* pp90, 99, 118, 126, 130, 145, 162.  
 25 At p87.  
 26 At p162.  
 27 At p194.  
 28 At p162.

Davidson, on the other hand, sees the law as usurping sovereignty from the people, who are left "chloroformed" and impotent.<sup>29</sup> Davidson argues that the Australian people are disempowered, because they have not done what "the rest of today's western democracies did to obtain democratic rights".<sup>30</sup> They have not acted collectively to assure the dominance of popular reason over the different reasons of the administration and the law, the executive and the judiciary.<sup>31</sup> There has been no Australian revolution.

Kercher, however, refutes this thesis, by pointing out that the delegates to the Constitutional Conventions were elected, and that the Constitution was put to two referenda of the Australian people.<sup>32</sup> He concludes, in an implicit reference to Davidson, that

although Australia was not born through a revolutionary demand for popular sovereignty, its constitution was more than a document of politicians and lawyers and more than the handing down of sovereignty by the imperial parent to its Australian children.<sup>33</sup>

Whilst Kercher concedes that the "precise location" of sovereignty is "still uncertain", he is dealing in terms of the transfer of sovereignty from Britain to Australia,<sup>34</sup> not in terms of the usurpation of sovereignty by the law.

## LEGALISM AND LINEARITY

It follows that Kercher and Davidson have markedly different approaches to legalism. Davidson refers to "the hegemony of a legalism that could accord no place to popular wisdom or the people".<sup>35</sup> Not only that; he defines legalism as "the fundamental characteristic of local legal reason",<sup>36</sup> accusing judges of interpreting statutes "according to strict

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29 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* p243.

30 At p190.

31 As above.

32 Kercher, *An Unruly Child: A History of Law in Australia* p158.

33 As above.

34 At p188.

35 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* p239.

36 At p137.

canons of legal interpretation, without ever looking behind it, or seeking to interpret it in the context of a prior history".<sup>37</sup> In contrast, Kercher's thesis is neither so simple nor so reproachful.

Not only does Kercher restrict the reign of legalism to the second part of his book, "Imperial Orthodoxy", when he concedes that judges were excessively conservative, he also challenges the notion that legalism itself is a simple and strict canon of interpretation. He notes "the difficulty of generalising about the restrictive nature of formalism or legalism".<sup>38</sup> He goes on to discuss legalism in various contexts. He concedes, for example, the imperialism of the common law.<sup>39</sup> He notes that "words are so manipulable and the supposed science of judicial reasoning so fluid that judges often have a broad range of possible choices".<sup>40</sup> He challenges the supposed neutrality of legalism, arguing that it "sometimes hides the role of the judges' values even from themselves".<sup>41</sup> Indeed, he cites approvingly from Sir Anthony Mason who argues that a "'strict and complete legalism' [is] a mask for undisclosed policy values".<sup>42</sup>

## GENEALOGY AND THE GRAND THEORY

This eclectic and equivocal portrayal of the development of Australian legal history pervading *An Unruly Child* is wholly unlike Davidson's all-subsuming theory. Davidson seems determined to fit each historical fact into his central thesis of the invisible power, whereas Kercher seems to have an innate mistrust of generalisation.

Kercher describes Australia's legal maturation as "creeping, oscillating, contradictory",<sup>43</sup> and the law as an "ambiguous and shifting legacy".<sup>44</sup> By focusing on individual colonists, Kercher is able to reveal the complexity of the law and the ambivalence of its operation: "if ... emphasis is placed on social history, on the lives of the colonists, there was no linear, albeit-contested, march to freedom in the Australian penal colonies".<sup>45</sup>

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37 At p137.

38 Kercher, *An Unruly Child: A History of Law in Australia* p169.

39 At p197.

40 At p175.

41 At p182.

42 At p189.

43 At p188.

44 At pxx.

45 At pp76-77.

In contrast, Davidson describes the relationship of the hegemonic state to its citizen as the leitmotif of the book,<sup>46</sup> and this relationship certainly does lead most of the discussion. As mentioned above, Davidson's thesis draws strongly on Foucault, and this is certainly evident in his discussion of the Benthamite Panopticon and surveillance mechanisms,<sup>47</sup> of the population becoming the focus of governance,<sup>48</sup> of human beings as subjects,<sup>49</sup> of the police whose object it is to "foster the citizen's lives and the state's strength",<sup>50</sup> and of the law as the mask of real power.<sup>51</sup>

Ironically, however, Foucault's appeal to the necessity of genealogy goes unheeded. Foucault recommends a commitment to the specificity or uniqueness of historical phenomena,<sup>52</sup> and an escape from "pervasive features of orthodox history, such as the assumptions of linearity, teleology, evolution".<sup>53</sup> Davidson, like Kercher, covers a broad range of Australia's social history, from the Myall Creek massacre through to the *Conciliation and Arbitration Act 1904* (Cth) and yet he is determined that each event fit neatly into his thesis.

This approach means that diverse and contradictory historical phenomena are reduced to the simple state/citizen dichotomy. The hegemony of law is reinforced on every page. The Federation of Australia is reduced to a lawyers' conspiracy;<sup>54</sup> paternalism is unequivocally either "despotic"<sup>55</sup> or "authoritarian";<sup>56</sup> the medical profession "manipulates the family" to

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46 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* pxvi.

47 At p100; Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin, London 1977) pp195-209.

48 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* pp199-217; Foucault, "Governmentality" in Burchell, Gordon & Miller (eds), *The Foucault Effect* (Wheatsheaf, London 1991) pp87-104; Hunt & Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, London 1994) pp25-30.

49 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901*; Hunt & Wickham, *Foucault and Law* p28.

50 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* pp101-107; Hunt & Wickham, *Foucault and Law* p27.

51 Hunt & Wickham, *Foucault and Law* p48.

52 At p6.

53 At p32.

54 Davidson, *The Invisible State: The Formation of the Australian State 1788-1901* p230.

55 At p190.

56 At p22.

ensure the "pre-eminence of the legal profession";<sup>57</sup> land was "bribery"<sup>58</sup> used to "hegemonise the population".<sup>59</sup> Eureka is symbolic of the state's power over the individual,<sup>60</sup> marriage is symbolic of the state's power over the individual,<sup>61</sup> even the Magna Carta is symbolic of the state's power over the individual.<sup>62</sup>

## CONCLUSION

I would argue, then, that the complexity of the interaction between law and society, captured clearly in *An Unruly Child*, fades into invisibility in Davidson's book. *The Invisible State* is certainly a fascinating postmodern account of the formation of the Australian state, yet its portrayal of a universally hegemonic law is, to a significant extent, a simplification. Whilst Kercher has conceded, in the second part to his book, that Australian judges during the "Imperial Orthodoxy" period were excessively legalistic,<sup>63</sup> this is only one of three parts that also discuss judicial innovation and activism. Davidson appears to have seized upon this legalistic period in judicial reasoning and universalised it. In universalising, he necessarily simplifies. The narrow discussion of the role of law and the hegemony of legalism contained in *The Invisible State* is thrown into stark relief against the richness of Kercher's portrayal of Australia's intricate and enigmatic legal history.

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57 At p200.

58 At p197.

59 At p196.

60 At p245.

61 At p52.

62 At p134.

63 Kercher, *An Unruly Child: A History of Law in Australia* p91.