

BOOK REVIEW
Criminal Law and Colonial Subject:
New South Wales, 1810 - 1830

by Paula J Byrne

Cambridge University Press, 1993, xiv, 301 pages, \$59.95 (hbk).

The 1980s witnessed a resurgence of interest in Australian legal history. Interest was manifested in two ways. One was the annual Law in History conference (the 12th conference was held in 1993), which attracted a small but growing band of enthusiasts, comprised of lawyers, historians, criminologists, and others. The other development was Alex Castles' seminal book *An Australian Legal History* published in 1982. There are signs that in the 1990s legal history will become even more popular. The Australian and New Zealand Law and History Society has recently been formed (April 1993) and publishers are now more inclined to support monographs on Australian legal history. Cambridge University Press ("CUP") has already made a noteworthy contribution by publishing in 1991 *The Invisible State: The Formation of the Australian State 1788-1901* by Alistair Davidson and *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* by David Neal.

These sophisticated books appear in CUP's Studies in Australian History Series as does *Criminal Law and Colonial Subject* by Paula J Byrne. Byrne uses court records to show "how law was lived in colonial New South Wales"; to show "the dynamic relationship between people and law" and what ordinary people understood "by guilt, suspicion, evidence, the 'offence'". She uses depositions (bulky documents "full of hearsay, drawings, and scraps of material") to describe "what a culture thought should be locked, hidden, silenced or spoken of in terms of the law". Byrne bases her study on the examination of all 5910 records of the Courts of Criminal Jurisdiction, the Quarter Sessions, magistrates' benches and the Judge's Advocate's bench that have survived for the period 1810 to 1830. She sees sex as "central to analysis", arguing that what was male and female "mean different things to administrators and to the ordinary population, but both regarded women as suspicious if they moved outside the boundaries of these different proper behaviours". The sexuality of women was regarded as far more important than their "work value".

Byrne is not concerned with Tasmania or Aborigines. Although before 1824 Tasmania was administratively part of New South Wales, Byrne does not attempt an analysis of the Tasmanian situation because "the pattern of court interactions differed so much that a separate study was warranted". Aborigines were rarely

involved in court cases. Byrne begins, in Chapter 2 on "Labour", by showing how the law intervened differently in the life of the male convict in the town, the male convict on the farm, and the life of the female convict. Byrne discovered "an enormously complex process by which law defined movement, space, ownership by accepting the employer's definition of a convict offence". She concludes that the law tried to keep "surveillance of the sexuality of the female servant, the time of the male town servant, and the consumption of the male farm worker". In Chapter 3 the focus is on "The House", especially theft and domestic violence cases, where suspicion appeared "more often in the construction of female guilt". In Chapter 4 on "The Body" Byrne considers for the male body how the courts dealt with sodomy, attempted unnatural intercourse, and bestiality, and for the female body rape cases, almost overwhelmingly brought by married women, with single women not appearing at all and domestic servants "very rarely". The courts subjected the female body "to far greater scrutiny" than the male body.

Bushranging is tackled in Chapter 5. It not only involved "a web of harbourers and receivers" but also "a much wider web of suspicion as to who these people were". In 1825 one magistrate wrote of "a strong party of the free emancipated population aiding their efforts by succoring" bushrangers in various ways. Byrne notes how police powers were increased to capture bushrangers, such as searching the homes of settlers "at any time of the day or night"; when men burst through their doors settlers were never sure whether they were police or bushrangers. Police also relied on paying for information. In Chapter 6 the theme of policing is pursued further, this time policing of the free population. Sydney was "at the forefront" of the development of new methods of policing but Byrne also describes the different styles of policing in Parramatta, Liverpool, Windsor, and the cow pastures (especially Newcastle and Bathurst). Sydney presented "a clear distinction between authority and its subjects", while in the country magistrates and constables were "highly individual in their modes of policing" and the distinction between authority and ordinary people "begins to blur". The free and freed population "expected a distinction to be made between policing of convicts and policing of themselves". Particularly in Windsor, attempts to arrest free people would provoke violence. "I am as free as you", said one indignant youth to Magistrate Mileham.

The popular use of the law is the subject of Chapter 7. All levels of the colonial population "brought information to courts for various reasons associated with revenge or personal acquisitions, as well as what was felt to be a wrong". Most important was "the role of courts in economic disputes". The law was "a battle ground" between master and servant. Disputes also occurred over debts and the currency used, over boundaries, over the destruction of crops, and over the impounding of runaway animals. Colonists took great

care to guard against the many informers who infested the colony. Hiding became "almost ritualistic". Cases involving violent attacks, often perpetrated by soldiers and inflamed by alcohol, were also brought to court. Byrne perhaps devotes too much space to six cases of infanticide. Access to the courts was greatest in Sydney and Windsor and, consequently, they were used extensively to solve disputes.

The final chapter examines trial hearings and the kinds of punishment meted out, including the lash, the treadmill, solitary confinement, and transportation to Newcastle, Port Macquarie and Moreton Bay. The punishment depended on "the personality" of magistrates, who at times used torture in questioning alleged offenders. Byrne concludes that "[c]omplaints, informers, witnesses, and defendants, alongside constables and magistrates, made colonial law" and sees her study as contributing to the question of "what power relations are involved in what people understand as law".

The text is supported by 16 figures and 31 tables. An appendix shows the number of cases for which depositions survive for various courts.

Byrne has assembled a rich collection of material, much of which is of interest. Her attention to convict women's use and perception of the criminal law and, more to the point, the criminal law's perception of convict women nicely complements Neal's work (noted above). But there are problems. I did not find the text reader-friendly. The author tends to pile example on example and could have been more judicious in her choices. Many quotations seem trivial and unenlightening. The writing style does not grab the reader's attention. We are inundated with names, but few are memorable, and fuller characterisations of some individuals would have been welcome. Throughout, the author compares the New South Wales experience with the English, American or European experience, but this adds little to her argument as the comparisons are not fully developed. I suspect that many of these problems stem from the book's origins as a PhD thesis. In short, the unevenness of this book detracts from its appeal. Nonetheless, specialists in colonial Australian history and legal historians should read this book for the information it conveys. I hope that others will emulate this skilful blending of social and legal history for other periods. There is much to be done.

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