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Volume 3 | Issue 1 Article 20

1-1-1997

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Recommended Citation
Frazer, A., Unfinished business. Bruce Kercher, An unruly child: a history of law in Australia, *Law Text Culture*, 3(1), 1997, 253-256.
Available at:http://ro.uow.edu.au/ltc/vol3/iss1/20

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Unfinished business. Bruce Kercher, An unruly child: a history of law in Australia

Abstract
Until quite recently legal history, as practised and taught in Australian law schools has remained fixated on a narrow range of 'lawyers' law'. Legal history sought the legitimating foundations of the current legal system and profession, concentrating on constitutional issues dealing with the establishment of the higher courts and legislatures, or on the reception of English legal doctrines in Australia. The focus and assumptions of such accounts were decidedly Whiggish. The story of law in Australia was one of progress and reason, as manifested in the transplantation of British institutions and English common law. The professionalisation and modernisation of law which accompanied the wholesale importation of English reforms, were assumed to lead more or less inevitably to our current system of justice. This perspective has been challenged in recent years by scholars influenced by social history and cultural studies, and more interested in tracing the distinctiveness of Australian law as well as its social impact. Significantly, most of the reassessment has come from outside the law schools, from historians interested in law not as an object in itself, but as one of many sites of cultural conflict and social change.

This journal article is available in Law Text Culture: http://ro.uow.edu.au/ltc/vol3/iss1/20

Unfinished Business

BRUCE KERCHER, *AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA*

Andrew Frazer

Until quite recently legal history, as practised and taught in Australian law schools has remained fixated on a narrow range of 'lawyers' law'. Legal history sought the legitimating foundations of the current legal system and profession, concentrating on constitutional issues dealing with the establishment of the higher courts and legislatures, or on the reception of English legal doctrines in Australia. The focus and assumptions of such accounts were decidedly Whiggish. The story of law in Australia was one of progress and reason, as manifested in the transplantation of British institutions and English common law. The professionalisation and modernisation of law which accompanied the wholesale importation of English reforms, were assumed to lead more or less inevitably to our current system of justice. This perspective has been challenged in recent years by scholars influenced by social history and cultural studies, and more interested in tracing the distinctiveness of Australian law as well as its social impact. Significantly, most of the reassessment has come from outside the law schools, from historians interested in law not as an object in itself, but as one of many sites of cultural conflict and social change.

This short book (215 text pages) is the first attempt to survey the history of law across Australia from 1788 to the present. As the author admits, it relies heavily on secondary literature, most of it published in the last decade. Rather than provide a comprehensive study, Kercher has aimed to give us a book that 'is about the contest over [law's] nature, the struggle between local and imperial officials, and between popular ideas and official law' (p ix). Kercher's persistent theme is how a transplanted English legal system adapted and evolved in response to the new social environ-

ment, and how the development of a pluralistic and responsive Australian law was resisted in the name of empire and reason. This process occurred amid frequent conflicts between the law makers over the role which law should play in the making of Australian society.

Kercher begins by examining the early colonial period in terms of both a penal colony and a frontier society confronting 'common frontier legal problems' (p44). Such problems included the legal status of the internecine frontier wars between Aborigines and European settlers over possession of the land, as well as the issues which arose from the imposition of a unitary legal system on an indigenous culture. Was the war with the Aborigines carried out under martial law, or were Aborigines protected by the common liberties of free-born Englishmen? Should the indigenous inhabitants be allowed to give evidence in the courts, or did their heathen status deprive them of an audience before British justice? Kercher argues that such questions were initially resolved by resort to local exigencies, expediency and self-interest (pp15,19), and that colonial law was only gradually and fitfully brought into conformity with the law of the imperium. This analysis, however, remains firmly focussed on the official pronouncements of the courts, rather than the popular notions of law and legality which contribute so much to a society's distinctive legal culture. He refers only briefly to the arguments in the 19th century over the legality of dispossession (Reynolds 1987). This account does not explain why such different solutions were reached in other 'settler societies'.

Starting with a novel analysis of property rights in convict labour, Kercher next examines what he describes as the 'contradictions of convict life'. The main 'contradiction' here seems to arise from the impossibility of maintaining in reality the legal non-status of transported felons. Rather than encourage a vast black market, the early judges ignored the common law and made their own rules 'to bring the activities of convicts within the law's scope' (p 42). The focus on apparent contradictions, which is later applied to married women and debtors, is redolent of the critical legal studies approach used by some American legal historians (Tushnet 1981). Kercher also draws on recent research into the convict period which explores popular conceptions of law and the relationship between social and legal values (Byrne 1993).

In chapter three, where Kercher relates his own original research on debt, matrimonial property, commercial transactions and conveyancing, he superbly illustrates the ways in which the theory and practice of law diverged sharply in the early frontier period. Local commercial customs

quickly emerged, replacing the strict letter of the law with norms more suited to the needs of mercantile capital and the peculiarities of the infant colonial society. Kercher shows how these local customs were recognised by the early amateur courts, even when the custom was contrary to English law and the governors' proclamations. The account reverts to a familiar institutional history in chapter four, where Kercher outlines the struggle over self-government up to the 1850s.

The demise of Australian judicial innovation from the mid-19th century is attributed in chapter five to the imposition of a uniform common law across the British Empire. The Privy Council, imperial and colonial governments, imported judges and a cringing local profession all contributed to the premature demise of a locally-based common law. Judicial servility was counterbalanced by experimental or adaptive legislation, passed by democratic colonial parliaments. In chapters six and seven, Kercher surveys the many legislative innovations made both before and after responsible government. While there are some good studies of policing, land settlement and divorce, the attempt to examine a compendium of developments over a long period results in the loss of too much significant detail, while the need for brevity tends to simplify the explanation of social and political changes. The most distinctive aspect of 19th century Australian law, the author suggests, is its institutional diversity. Beginning in the frontier period, amateur and then specialist professional courts exercising general equitable jurisdictions contributed to the pluralism of legal sources (p152), thereby diluting the hegemonic British influence.

This book is largely a history of 19th century law. The final two chapters on the twentieth century extend Kercher's theme of adaptation and subservience. With gradual formal independence, direct control was replaced by allegiance to 'the empire of strict law' (p175). The features of this hegemony are related by Kercher to the reasoning processes of legal formalism, although the details remain vague. Cultural features, such as the uncritical and derivative form of legal education which prevailed until the 1980s, help to provide a general explanation for the profession's attachment to this particular mode of thinking for so long. But the precise contours of Australian legal thinking in the 20th century, for the most part, remain obscured by a paucity of detailed studies and the judiciary's adoption of the explicitly neutral discourse of legal formalism. Kercher tries to fill the gap with sketches of leading judges and their cases, but the compendium approach simply will not provide sufficient meaning for such a complex period.

Bruce Kercher has produced a useful introduction to Australian legal history, accessible to the non-lawyer with some knowledge of Australian political and social history. He has also provided an invaluable stocktake of the present state of Australian legal historiography. His approach to law is sensitive to the social background and consequences of legal rules. However the ambitious scope of the project means that the linkages needed to sustain his argument, particularly at the levels of the economy and culture, are not pursued. Reliance on secondary works also skews the account towards the conventional.

In large part, the gaps in the story reflect the paucity of research on the history of law in Australia. We know almost nothing of how ordinary people regarded law or how it affected them. Despite some useful work by academic and practising lawyers (in the capacity of lay historians), we do not even know much about the history of judicially-developed doctrine in Australia—the bread and butter of traditional legal analysis. As Kercher readily agrees (p x), we need more studies which explore differences in both official sites of, and popular attitudes towards, law. Such approaches promise a very different vision of law and its imposition from that offered by the law makers.

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