The Rule of Law in a Penal Colony: Law and Power in Early New South Wales
David Neal

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Australia should be the country lawyers most love to study. In the half century after the first British settlement was established in 1788, the majority of immigrants to Australia had been selected by judges and juries in Britain and Ireland. They were convicts. Although their discipline was a perennial concern of the colonial authorities, breaches of discipline could not be punished in a summary fashion. Convicts had to be brought before a court, where they could give evidence and even initiate complaints. It was not simply that early Australia was saturated in law. A full complement of legal institutions and legal practices evolved in this anomalous society. This is the paradox presented, unintentionally, by Robert Hughes in his best-selling book *The Fatal Shore* (1987); the first gulag became a complacent law-abiding community.

Why, then, did it take *The Australian and New Zealand Journal of Criminology* twenty-four years, until its forty-eighth issue in 1991, to accept or commission articles on the startling criminological experiment that had taken place in its own country? The best explanation is a double one. First, the historically orthodox view of the convicts since 1950 has been that they came from a self-perpetuating criminal caste in the United Kingdom. Because they were outside the normal class structure, they were uninteresting to social scientists; the idea of a separate criminal class has been an easy but disabling concept for scholars. Second, the apparently conventional outcome of Australian society after its apparently lurid origins seems to defy logic, so the problem has been sidestepped.

In the last fifteen years, most historians of nineteenth-century England have undermined and rejected the stereotype of a distinct criminal class; crime was committed by people inside the class structure. The publication in 1988 of a collection called *Convict Workers*, edited by Stephen Nicholas, brought this new orthodoxy to Australia. *Convict Workers* demonstrated that the convicts were members of the conventional working classes at both ends of the voyage. Their destiny in Australia was work, with which they were familiar before their transportation. Essays by Garton and Dyster provide a history of this debate.


David Neal, an academic lawyer and law reform commissioner, tackles the paradox head-on in the book under review. How did a free society emerge from conditions of unfreedom? And what defines a free society, anyway? Neal engages in a sustained debate with John Hirst, whose view had convinced and confused Robert Hughes part-way through composition of *The Fatal Shore*. Hirst argued that the colony was free from the outset because officials and non-convict immigrants, a minority of the population, conceded substantial autonomy to the convicts so as to gain their co-operation in making the settlement profitable for the masters. This was the tendency, too, of the arguments in *Convict Workers*. Neal replies that such freedoms were severely qualified. Authorities and convicts alike emphasized the difference between still being under sentence and having passed through the sentence, either by serving out time or by pardon. The authorities had recourse to the gallows, the whip, the chain gang, and consignment to remote prison stations. Convicts, unlike free people, were liable to corporal punishment for simple insubordination. The system was meant to punish and intimidate. Australia began as a penal society, not as an eccentric kind of free society.

Why was Australia not an English-speaking Devil’s Island? Neal’s answer is, the English “rule of law.” For scholars such as J. G. A. Pocock and Christopher Hill, the rule of law evolved in the seventeenth century as a counterweight to the royal prerogative. For E. P. Thompson and Douglas Hay its observance in eighteenth-century England formed the basis of an implicit social contract between upper and lower classes. Why should this contract be affirmed in a prison colony? Did not Blackstone, the vastly influential legal propagandist of the eighteenth century, assert that convicts were civilly dead because subject to attainder, their sentence being commutation of the death penalty? Neal’s answer, like Hirst’s, is found in the preponderance of convicts in the population. Minor administrative tasks in both private and public sectors (clerks, constables, overseers, etc.) were necessarily undertaken by convicts, while many farmers and businessmen were former convicts. Most convicts were allotted permanently to a private employer, a practice known as assignment, and many employers had once been convicts themselves. If contracts and labor discipline were to be enforced, and other

J. of Criminology; B. Dyster, “Transported Workers” (May 1991) 60 Labour History; *idem*, “Convicts” (1994) Le mouvement social (publication pending).

disputes settled, by procedures long found convenient in the mother country, then convicts had to be accepted at least as witnesses, and emancipists (the term for former convicts) had to have rights as principals. For the first thirty-five years, military officers comprised every jury. The amalgam of civilian court and court martial emboldened the authorities to allow all people access to arbitration, whatever their criminal history.

There is another dimension to the Australian case. Neal cites (pp. 21–22) the noted jurist and politician H. V. Evatt, who said of the early period:

The courts were the true forums of the little colony. They had no competitors as a means of expressing individual or public grievances. There was no legislature, no municipal government, no avowed political association or party, no theatre and no independent press... Bitter skirmishes between the opposing interests almost necessarily assumed the form of legal contests, because they could not be fought elsewhere.

Until the first parliamentary election in 1843, the courts, then, were central to politics. Because military officers formed the juries, officers and former officers used the courts confidently against their rivals, who might at times include the governor. Once rivals were dragged into this robust arena, it was hard to deny those rivals access on their own account. Emancipists above all welcomed the chance to affirm their status as British citizens, as well as to protect and advance material interests. Neal argues that the emancipists' campaign for trial by civilian jury, and for the right of emancipists to be jurors without prejudice, became the exemplary issue in Australian public life, and that the achievement of trial by jury, in stages between 1823 and 1833, was a necessary though not sufficient step toward a free society and representative government (New South Wales persisted as a penal society, however, until 1840, when the British stopped sending prisoners there). This freedom was hard won by struggle through the courts and struggle over the courts.

This fine and literate book begins and ends with reflections on freedom and unfreedom, power, authority, and compliance. It draws on a diverse array of social theorists, legal scholars, and historians without being trapped in their formulas or their jargon. Chapters on the courts, the magistracy, and the police explore the institutional framework. An author from outside the profession of law might spend more time than Neal does discussing the comparability of the colonial Australian and British economies. The rule of law became established in England with the development of a fully commercial society, where labor and land had become as much commodities for exchange as were the goods produced by that labor and land. If the rule of law was to be transferred, it might be thought that the community receiving it must display a similarly commercial bent,

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strengthened in turn by these peculiar legal arrangements. Neal sensibly plays to his strength, an understanding of law, and of law as a social artefact. His book provides a splendid example of the study of law in context.

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Deciding for Others: The Ethics of Surrogate Decision Making
Allen E. Buchanan and Dan W. Brock

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This book concerns itself with one central question—how should medical treatment decisions be made for those who are not competent to make such decisions for themselves? Its authors are philosophers who began their work in this area when both were staff philosophers (a wonderfully appealing job title) with the American President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research in the early 1980s. The book is aimed at a wide audience—lawyers, judges, health care workers, health policy makers, moral philosophers, and bioethicists. It is of broader interest as well—resolution of questions that arise in the making of treatment decisions for incompetent persons are likely to touch all of us, not necessarily or only in our professional capacities, but almost certainly in our relationships with others who are or become incompetent, and as individuals facing that possibility ourselves.

Although much of the book is an expansion of material the authors had written earlier and the legal references are almost exclusively to American cases, nonetheless, it remains useful for its thoughtful approach to determinations of competence and for its review and analysis of the premises underlying various models of decision-making for incompetent patients. With proposals to regulate substitute decision-making in health care piling one on the other at a rapid pace in Canada now,¹ it becomes all too easy to focus on the mechanics of the particular

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