Resistance to Law under Autocracy

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We all know that Fletcher Christian and his mutinous mates threw Captain Bligh off the *Bounty* in 1789. As Bligh said, in his water-stained log book which was recently on display in the State Library of New South Wales:

> I am now unhappily to relate one of the most atrocious acts of Piracy ever committed. Just before sunrise Mr Christian & the Master in Arms & several others came into my Cabbin while I was fast asleep, and seizing me tyed my hands with a Cord & threatened instant death if I made the least noise ... 'Hold your tongue Sir or you are dead this instant' was constantly repeated to me.[1]

It is less well known by those who live outside Australia that Bligh suffered a similarly humiliating episode in 1808, when he lost control of an entire colony. Bligh arrived in Sydney in 1806, as the fourth governor of New South Wales. His temper was not the sole cause of his loss of control of the penal colony two years later. For the previous decade the colony had been embroiled in a conflict between the governors and the officers of the notorious New South Wales Corps. Bligh's two immediate predecessors, Governors Hunter and King, had favoured small ex-convict farmers over their creditors, the traders, whom the military officers supported. This was as much a tussle over the nature of the colony, whether one of free trade or of yeomen farmers, as it was for political and financial control. The coup against Bligh, which took place on 26 January 1808, the twentieth anniversary of the foundation of the colony, was the culmination of years of squabbling in and out of the courts. It was the ultimate expression of rejection of law in the Australian colonies, but it was not a popular rebellion. This was a revolt by one part of the ruling class, the military officers, against another.[2]

A naval officer with an infamous temper was hardly likely to apply all the laws of England, especially in a colony full of Irish and British convicts and one subject to such dangerous politics. When reminded of the law by Judge Advocate Richard Atkins on one occasion, Bligh replied '[t]he law sir! damn the Law; my will is the law, and woe unto the man that dares to disobey it!'.[3] He expressed the same notion more forcefully in 1807 when responding to a leaseholder who was pressing what he argued were his rights under English law: 'Damn your laws of England! Don't talk to me of your laws of England: I will make the laws for this colony, and

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1 W. Bligh, *Log of Proceedings of H.M.S. Bounty*, 28 April 1789 (in Mitchell Library (ML), Cy Safe 1/47).

2 For further development of some of the themes in this article, see B. Kercher, *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales* (Sydney: Federation Press, Sydney, 1996). The following paragraphs on the colony's constitution are based on this source.

3 Atkins' evidence, in J. Ritchie, (ed), *A Charge of Mutiny: the Court Martial of Lieutenant George Johnston for Deposing Governor Bligh in the Rebellion of 26 January 1808* (Canberra: National Library of Australia, 1988) 161.

every wretch of you, son of a bitch, shall be governed by them; or there (pointing over to the gaol) is your habitation!'[4]

Bligh was the only person in New South Wales to take this line however, the only one to reject English civil law so explicitly. Even the rebels justified their actions against Bligh by reference to what they thought were the illegal acts of Bligh himself. All other governors and all judges made at least some attempt to apply the civil law of England that they knew was the core of the colony's law. According to the common law, in supposedly settled colonies such as New South Wales, the law was fundamentally that of England. Blackstone said that settled colonies received so much of the law of England as was 'applicable to their own situation and ... condition'.[5] Most people in the colony assumed that this was so, but when provoked at least, Bligh did not show much concern with this fundamental point.

Like all the New South Wales governors in its foundation years, Bligh enjoyed a legal position that was as close to autocracy as English law allowed in the nineteenth century. The governors were appointed under commissions issued by the crown, and also received royal instructions as to how they were to act.[6] Expressly or by implication, these orders gave them personal control over the colony's judiciary, administration and law making. The governors shared judicial power with a judge, also appointed by the crown. The judge bore the military title of Deputy Judge Advocate, and when he sat in the colony's main civil court, the Court of Civil Jurisdiction, he did so with two lay assessors rather than a jury. The governor chose the assessors, and decided when this court was to sit. For most of the first 25 years, these Judge Advocates (as they were usually known) were legal amateurs. For law, they were reliant on their copies of Blackstone and the rather dubious legal advice of a few attorneys who had been transported for forgery or perjury. Aggrieved litigants were entitled to appeal, but at first this was to the legally untrained governor himself, who sat alone in the Court of Appeal.[7] From him, there was an appeal to the Privy Council in larger cases, but only one case ever went to London for final decision in the first 25 years.

The British government decided that a penal colony had no need or right to a legislature, so the governors quickly developed a practice of making Orders or Proclamations in place of local legislation. Most legal historians have concluded that this was lawful by imperial standards, so long as the Orders did not contradict the laws of England.[8] The governors also had complete legal control over the colony's administration and they made appointments to the magistracy. All of this was subject to theoretical review in England, but the British government was thousands of miles away and it was preoccupied with France for much of this period in any event. While the colony remained a quietly functioning place to send

4 Mann's evidence, in *ibid* 365.

5 W. Blackstone, *Commentaries on the Laws of England* (9th ed, 1783, New York: Garland Publishing, reprint 1978) Vol 1 108.

6 See A. Castles, *An Australian Legal History* (Sydney: Law Book Co, 1982) 34–35.

7 The colony's courts were established by Letters Patent (the First Charter of Justice, 2 April 1787) and by legislation ((1787) 27 Geo III c 2).

8 E. Campbell, 'Prerogative Rule in New South Wales, 1788–1823' (1964) 50 *Journal of the Royal Australian Historical Society* 161, 180; R. Else-Mitchell, 'The Foundation of New South Wales and the Inheritance of the Common Law' (1963) *49 Journal of the Royal Australian Historical Society* 1, 5; V. Windeyer, *Lectures on Legal History* (Sydney: Law Book Co, 2nd ed, 1957) 306. For a broader view of their powers, see H.V. Evatt, 'The Legal Foundations of New South Wales' (1938) 11 *Australian Law Journal* 409, 421; H.V. Evatt, *Rum Rebellion A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (1938, Sydney: Angus and Robertson, reprint, 1976) 82–83.

prisoners, it seems, the British government was willing to overlook any illegalities that might have occurred.

Since all the governors were military or naval officers, the Judge Advocates had a military title, and the jury in the criminal court consisted solely of military and naval officers, one possibility was that these people would apply martial standards of law. This likelihood was reinforced by the obligation of the Judge Advocates to obey the governors. Indeed, the commissions of the first two of them required them to act 'according to the rules and disciplines of war'.[9] This may have been behind Bligh's famous damning of the civil law.

This colony is a valuable site for the study of the relationship between formal and informal law. Popular conceptions of law, particularly those of the convicts, may seem to have been less likely to have had an effect under such an autocracy than anywhere else. If popular practices were incorporated into the formal law of early New South Wales, it seems that the same is likely in almost any society.

A number of writers have shown that the practices of ordinary people are frequently based on implicit notions of right or law. Among them is Hartog, in his influential analysis of pig keeping in early nineteenth century New York City.[10] The aim of this article is to take this notion further, to see how far popular ideas about law filtered upwards and became incorporated in the formal law of New South Wales. The article illustrates this by reference to two periods, the foundation years from 1788 to 1814 and, for contrast, during the Chief Justiceship of Francis Forbes from 1824 onwards, after the end of the governors' autocracy.

Swinish jurisprudence

The autocratic governors of New South Wales found that they could no more enforce their version of the law on the disorderly people of the colony than could Hartog's New York law makers, who failed to restrict the actions of pig keepers. In fact the formal rules and popular reactions to pig keeping in the tiny town at Sydney were similar to those of older, more urbanised New York. The colony's governors issued progressively tougher regulations concerning straying animals, finding that their first Orders were ignored. The common law and the governors were not the only sources of legal ideas about straying animals. Even the people of convict New South Wales disobeyed official Orders when the formal law contradicted their customary practice of allowing animals to wander.[11]

Few disputes about straying animals reached the courts, but one of them which did so became one of the most celebrated cases in the colony's short legal history. Some people expressed their dissatisfaction with the lax enforcement of official regulations by shooting trespassing animals. When this happened in 1795, it led to a major confrontation between the civil government and its military body, the New South Wales Corps. John Boston was one of very few free settlers in the colony's first 10 years. When his sow strayed near some land owned by Captain Foveaux of

9 See *Historical Records of Australia* (HRA), 4/1, 1, 29, 46.

10 See H. Hartog, 'Pigs and Positivism' [1985] *Wisconsin Law Review* 899; E.P. Thompson, *Customs in Common* (Harmondsworth: Penguin Books, 1991); P. Karsten, 'Pigs and Negativism' (paper delivered at the 1996 Annual Meeting of the American Society for Legal History, Richmond, Virginia). Regarding New South Wales, see P. Byrne, *Criminal Law and Colonial Subject: New South Wales 1810–1814* (Cambridge: Cambridge University Press, 1993).

11 See *Sydney Gazette*, 11 February 1810, 1; 11 August 1810, 2; 15 September 1810, 1; 6 April 1811, 3; 21 September 1811, 1; 14 March 1812, 1; 6 November 1813, 1.

the Corps, a soldier shot it. On finding his dead pig, Boston shouted 'who is the damned rascal that shot my sow?' Quartermaster Laycock, feeling that this infringed the delicate honour of the pig-killing member of the Corps, told Private Faithfull to beat Boston. Boston then sued for damages for assault and was awarded a miserly £1. In this and in similar cases, the courts made the point that the military had no greater rights in the colony than anyone else, that they fell under the local version of the rule of civil law, even though the message was muted by the small sum awarded in this case. The decision was important because Hunter had been in the colony for only a short time, appointed after some years of a military inter-regnum. Between 1792 and 1795, the officers of the New South Wales Corps had become accustomed to economic and legal domination. They ran the colony along military lines, with little regard for civil law. Hunter was the first of the governors to confront this military domination in a line which ended with Bligh. He was determined that the colony would be ruled by civil law.[12] Except during the inter-regnum then, New South Wales was not ruled by military law.

Market practices

The governors were equally frustrated when they found that their Orders to protect the poor against rising food prices had little effect. Capitalism may have arrived on the first fleet in 1788,[13] but it was not accompanied by fully developed capitalist law and practice. When a catastrophic flood destroyed much of the colony's wheat crop in 1806, Governor King quickly resorted to principles which E.P. Thompson's eighteenth century English crowds had asserted so vigorously in pressing for the retention of their version of the moral economy. King revived the ancient common law rules against regrating, forestalling and engrossing, practices which he described as 'monopolising'. Governor Macquarie went further in 1810, stating that 'it is a high Offence against the Public to commit any Practices to enhance the Price of Merchandize coming to Market, particularly the Necessaries of Life, for the Purpose of enriching an Individual'.[14] He went on to make a permanent prohibition against these market practices.

Just as Thompson found for England then, the New South Wales governors reacted to food crises by reviving old anti-laissez faire laws which were dormant in normal times. This revival, though, was merely symbolic, as it is apparent that the governors' Orders were ignored. Their Orders concerning the price, weight and quality of bread (the assize of bread) were frequently enforced in the magistrates' courts, but the court records are silent on the enforcement of the prohibition against engrossing and other market practices. Either the practices stopped immediately on the Orders being made, or they were ignored. It is much more likely that the

12 *John Boston* v *Thomas Laycock, Neil McKellar, William Faithfull and William Eaddy*, 8–30 December 1795, 2/8147. Except where indicated, case references are to those of the Archives Office of New South Wales (AONSW). See Kercher, n 2 above, 26–27; J. Nagle, *Collins, the Courts and the Colony: Law and Society in Colonial New South Wales 1788–1796* (Sydney: UNSW Press, 1995) 257–266; G. Parsons, 'Was John Boston's Pig a Political Martyr? The Reaction to Popular Radicalism in Early New South Wales' (1985) 71 *Journal of the Royal Australian Historical Society* 163. For another action over the shooting of a pig, see *G. Blaxland* v *John Bennett, Sydney Gazette*, 19 July 1807, 2; and 23 August 1807, 2. See Kercher, n 2 above, 108.

13 See G. Parsons, 'Why Was There No Lasting Friendship in Early New South Wales?' (1996) 142 *Overland* 70.

14 *Sydney Gazette*, 29 September 1810, 1. See Thompson, n 10 above, chs 4 and 5; and Kercher, n 2 above, 173–177.

practices continued and that enforcement failed here as it did on so many other occasions. Like their failed animal-control regulations, the governors found that they could not control the market.

The same happened when the governors attempted to regulate the price of labour. A shortage of workers in the colony meant that the official limits on incomes were always 'either evaded or disregarded', according to the parliamentary Select Committee on Transportation in 1812.[15]

There was one sharp difference between Thompson's description of the English crowds and the experience in early New South Wales: there were no food riots in the colony. Thompson argued that the English crowds were asserting their ancient beliefs about appropriate market practices when they engaged in forced sales and other vigorous behaviour. This compelled the magistracy to revive its waning paternalism and to express it through law. In New South Wales there was no need for popular actions like this, because all of the governors in the first 25 years expressed and practised paternalism. The usual beneficiaries of this were the ex-convict grain growers along the banks of the Hawkesbury River. When they clashed with military officers and traders, the governors usually supported the small farmers.

Convicts' rights

These are just a few examples of the governors' policies that encouraged convicts and emancipists to participate in daily commercial life. The governors assigned convicts to work for private settlers, or for the government itself. Privately assigned convicts sometimes had to find their own accommodation, often on permissive occupancy sites in an area near the harbour called the Rocks. They were allowed to work for themselves after three p.m., earning money for food, accommodation or alcohol. Sometime around 1801, Governor King established the ticket of leave system, which was analogous to modern parole. When a ticket was issued to a serving convict, it authorised her or him to live and work independently of assignment while remaining under sentence. Like the pardons which ended convict status, these tickets were discretionary devices used to engender loyalty to the crown.[16]

In the foundation years, convicts wore no uniforms, lived with their masters or in their own huts or lodgings rather than in barracks or prisons, and mixed with free people. They were forced to work, however, and their labour was particularly important to the government. In 1798, Governor Hunter issued an Order which prohibited the imprisonment for debt of government convicts, those assigned to public work. The government had first claim on their labour, Hunter claimed, not the publicans and others who had them imprisoned in Sydney Gaol. As usual, this Order was frequently ignored. Hunter thought that the civil court took no notice of it, 'no doubt because a fee attended' the action.[17] That is, he accused the Judge Advocate at the time, an attorney called Richard Dore, of deliberately imprisoning convicts because Dore made money by doing so. The governor also thought that Dore was too close to the military clique who had been attempting to run the colony since 1792, and that he was too partial to trading interests generally.

15 HC, *Report from the Select Committee on Transportation* 841 (1813), 5.
16 On convict rights, see Kercher, n 2 above, 49–65.
17 Hunter to Portland, 21 February, 1799, HRA 1/2. 246.

The significance of this is that it was not just the general population which ignored a governor's Order, but the Court of Civil Jurisdiction as well. This was so even though the governors sat alone in appeals from the civil court, and despite the Judge Advocates being required to obey the commands of the governors.

Governor King went further in 1801, when he repeated Hunter's Order in broader terms. King's Order covered all convicts, not just those assigned to work for the government, and was expressly directed towards the civil court. He ordered the court not to allow convicts to be taken from their inhabitations on a summons or writ for debt. Dore was dead by then, and the civil court under his successor, Richard Atkins, followed the new Order, but in a peculiar way. It developed a new rule which was not justified by the colony's constitution, the common law or the governors' Orders: the court held that serving convicts could no longer sue or be sued in the Court of Civil Jurisdiction, but could do so in the lower magistrates' courts.

The common law provided that any person who had been sentenced to death for felony could not hold property, sue in the courts or give evidence, but that actions could be taken against these attainted, civilly dead people. Before 1801, this rule was ignored completely in New South Wales. The first civil action in the new colony was taken in July 1788, when two attainted convicts successfully sued a ship's master for losing their luggage on the voyage from England.[18] Attaint was not treated as part of the law of New South Wales until the civil court made its peculiar interpretation of the 1801 Order. The court's interpretation created a new local law, under which ticket of leave holders received the civil freedom to sue in the superior local court, and serving convicts could do so in the magistrates' courts.[19]

From the imperial perspective, much of this was unlawful. Attaint was not necessarily part of New South Wales law, because under the common law's reception rules it may not have been applicable to the colony's circumstances. However Hunter's Order went further than merely refusing to follow the restrictions on the activities of condemned convicts as the reception law would have allowed. It removed some of the rights of their creditors, and nothing authorised that. When Dore refused to follow Hunter's Order, he may have been doing what he ought to have done, wittingly or not. That is, he may have been following the formally applicable law. If so, this would have been a remarkably early example of judicial review of legislative actions. King's Order went further beyond the laws of attaint, and further into imperial illegality. The inclinations of Judge Advocate Atkins were similar to those of King, and it is no surprise that his court created the two tier system of justice, one for convicts and the poor and the other for free people and ticket of leave holders.

This local law on the rights of convicts was crucial to the operation of early New South Wales. It was not a prison as we now know it, but was more like the debtors' prisons of eighteenth century London. Within the penal colony, even serving convicts had a remarkable degree of freedom to make their lives as they wished. They were part of the ordinary life of the colony and were free to buy liquor and fall into debt. If they lived alone and earned their own money, no law or court could stop them from running up debts and credits. Dore recognised that when he ignored Hunter's Order, and so did Atkins' court when it bent King's Order by

18 *Cable [Kable]* v *Sinclair*, July 1788, 2/8147.

19 *John Kenny* v *Rev Samuel Marsden*, 4 August 1801, 2/8147; *Rev Samuel Marsden* v *John Kenny*, Court of Appeal, 30 August 1801, in P.G. King, *Letter Book: Legal: Correspondence with Judge Advocates, Reports of Appeals, etc., 1800–1806*, Vol 4, ML, A2019, 18.

creating the two tier court system. Serving convicts could sue for the wages they earned in the afternoons, and they could be sued for their own debts, but only in the lower magistrates' courts, those which also controlled their working activities through the lash. This mix of official and unofficial, imperial and colonial approaches to law was typical of the frontier law of early New South Wales. Popular actions were as much part of the law making process as the inherited laws of England or the sentiments of the local judiciary.

Trade and currencies

One of the prevailing myths of Australian history is that rum was a formal currency in early New South Wales. The records of the Court of Civil Jurisdiction show that it was not. The role of alcohol was more complicated than that. The colonists were very fond of alcohol, as were British sailors. On one voyage from England for example, the crew drank 216 gallon of spirits under what they claimed was a customary practice which allowed them to drink whatever was on the ship.[20] Even lawfully consumed alcohol was drunk in what now seems a surprising quantity. The normal daily allowance for passengers on voyages from England was about half a pint of spirits plus a pint of wine.[21] Heavy drinking was just as common in the colony, where even some of the judges and governors were renowned for their alcohol consumption.

The governors imposed a maximum price of £1 per gallon on alcoholic spirits, and to prevent the manipulation of farmers by liquor sellers, they prohibited the purchase of farm produce or the payment of debts in rum. These Orders, like all others which attempted to prohibit accepted daily practices, were usually ignored. However it was risky to neglect these particular rules because they were enforced sometimes and the penalties were harsh. When one convict, John Green, exchanged spirits for wheat, he was sentenced to confinement at the hellish Norfolk Island, plus forfeiture of both his wheat and alcohol.[22] The maximum price was very often ignored, even by the civil court. In one long series of cases, a free man who lost 110 gallons of rum to the practice of ships' crews drinking the cargo, managed to obtain compensation from the Court of Civil Jurisdiction at almost twice the official price; this decision was made by the sober Anglophile barrister-judge, Ellis Bent. There was a black market rate in the colony, and that was the price the plaintiff would have been forced to pay to replace what had been stolen.[23]

The British government provided few legal tools for the commencement of trade in its remote penal colony of New South Wales. Although it created a civil court to apply the basic law of England, it failed to provide the colony with bankruptcy and insolvency laws. Between 1788 and 1798, and then from 1800 to 1810, the British government supplied only legal amateurs to preside over judicial decisions on the vastly complicated laws of trade. The government also populated the colony with attainted convicts, who should have been unable to hold property let alone trade

20 See the evidence recorded in *Thomas Kent* v *Captain William Mattinson*, 24 September 1810, 5/1104–34.

21 See *Colonel William Paterson* v *Captain Nicoll*, 19 November 1799, 2/8147.

22 HRA 1/3. 469.

23 *Thomas Kent* v *Robert Campbell as surety for Captain Mattinson*, 17 November and 22 December 1809, 2/8149; *Thomas Kent* v *Captain William Mattinson*, 21 November 1809, 2/8149; *Thomas Kent* v *Captain William Mattinson*, 24 September 1810, 5/1104–34.

with one another and with England, and it sent much too little sterling for trade to develop. Any sterling that did arrive, chiefly through payments to military and civil officers, quickly left again as it was spent on essential imports. In the first decade, the officers' monopoly over the import trade was based on their near monopoly over sterling.

Despite these restrictions, vigorous trade began within 10 years of the commencement of the colony. Seal skins were soon being gathered in boats that were built by emancipated convicts and a few free merchants. They sailed to New Zealand and to the islands south of Australia, slaughtering thousands of animals for the benefit of the hat wearers of London. Buyers paid for the skins with bills of exchange drawn on London merchants. This provided a new source of sterling to the colony, ending the officers' monopoly over sterling. The colonial governors' policy of encouraging emancipists onto the land also had important implications for trade. When they sold their crops to the government, they, too, obtained sterling.[24] Despite that, the shortage of sterling remained acute throughout the foundation years.

This lack of sterling led to the development of other forms of currency and payment, of which promissory notes, or 'currency', were the most important. (Locally born people were known, derisively, as currency and those who came freely from England as sterling. The sting was that currency was always doubtful, always inferior, always discounted when exchanged for sterling.) Promissory notes were negotiable instruments under which the maker promised to pay to a named person, a bearer or to order, a fixed sum at a fixed date in the future. The promised payment was in a wide variety of ways, in sterling, in 'currency', in coin or in kind such as wheat (though rarely rum). The amateur judges in the civil court accepted all of these, except alcohol, as valid currencies. The earliest promissory notes were issued on a casual basis, after a night's drinking for example, but they soon became the core of a business under which they were deliberately issued at a discount from sterling. These organised issuers became known, pejoratively, as petty bankers.

The concept of negotiability helped make promissory notes an effective substitute for sterling. Notes circulated from hand to hand as a form of money; a buyer in a shop would hand over whatever notes he or she had, and the shopkeeper would then pass them on to someone else. Negotiability meant that the holder of a note who had paid for it without notice of a defect in its title, took the full value of the note despite the defect. Circulation was also helped by the effects of indorsement: anyone who signed a note at the time of paying it over became liable on it like the original drawer.[25]

The promissory note system relied on the credit-worthiness of the makers and indorsers of the notes. In a penal colony, this meant that the currency and trading systems depended on the honesty of convicted thieves. Their character can be judged from those who issued promissory notes payable some months in the future, but who drew the notes in fading ink so that only a blank piece of paper would still exist at the time of payment.[26]

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24 On currencies and the governors' futile attempts to control them, see S.J. Butlin, *Foundations of the Australian Monetary System 1788–1851* (Sydney: Sydney University Press, 1968) 12–109; and Kercher, n 2 above, 131–136.

25 *Edward Powell* v *William Packer*, 18 April 1811, 5/1105–165; *Sydney Gazette*, 27 April 1811, 2; and see *John Kenny* v *Rev Samuel Marsden*, 4 August 1801, 2/8147. On the development of English law on this topic, see J. Rogers, *The Early History of the Law of Bills and Notes: a Study of the Origins of Anglo-American Commercial Law* (Cambridge: Cambridge University Press, 1995); J.M. Holden, *The History of Negotiable Instruments in English Law* (London: Athlone Press, 1955).

26 Butlin, n 24 above, 27.

The governors frequently made regulations in futile attempts to control the trade in promissory notes. To stop the issues of notes by convicts, for example, they ordered that handwritten notes would no longer be valid. The government controlled the only printing press in the colony, and it was safely located in the grounds of Government House. Governor Bligh also ordered that notes expressed to be payable in currency or in kind were to be paid in sterling. These Orders, too, were frequently ignored by the population and by the civil court.

Governor Macquarie accused Ellis Bent, the barrister-Judge Advocate who had sailed with him from England, of deliberately ignoring these Orders so that Bent could make a profit from currency speculation. The surviving evidence on the point is ambiguous.[27] What is not ambiguous however, is that these notes were the colony's main currency, and that the population of the colony had no choice but to use them until sufficient sterling was placed in circulation or bank notes began to be issued. Trade had a life of its own, and the supposedly autocratic governors could do little about it.

Land

Early New South Wales was a surprisingly egalitarian place, which is shown most clearly by the colonists' attitude to land. Land ownership had none of the political and class connotations which it had in England at this time. When convicts gained their freedom, the colonial government granted many of them a small farm on condition that they lived on it and worked it for a number of years. They were required to pay periodical quit rents, in effect a purchase by instalments, but these payments were poorly enforced. Soldiers also received grants of land, but they were exempt from the residence requirements. Houses and farms, especially uncleared ones, often had little cash value, 25 acre farms being sold for as little as a gallon of rum.[28] They frequently cost much less than a good horse.

This popular, and capitalist, attitude to land is shown most clearly by the way it was bought and sold. When the government made a new land grant, it issued a document called a crown grant which became the basis of the practical title to the land. In 1814, for example, a sharp operator known as Dick the Needle (Samuel Phelps) bought a valuable farm for the price of a mare, a foal and £5. He was illiterate and so was his seller, Thomas Sanders. Phelps resold the farm to Thomas Jones, but then Sanders reclaimed the land. Sanders said he had only leased it to Phelps and that Phelps thus had no right to sell the freehold to Jones. Only the crown grant was available to show who owned the land. Phelps said there had been a written contract of sale when he bought the land, but that it was lost. Nor was the sale noted on the back of the crown grant, as the popular practice sometimes had it. Despite the flimsiness of this chain of title, the civil court under the usually strictly English Ellis Bent allowed it to stand.[29]

The governors had recognised the danger of land titles being based on oral evidence. They ordered that all contracts for the sale of land were to be invalid

27 C.H. Currey, *The Brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffery Hart Bent* (Sydney: Sydney University Press, 1968) 82–85; and see *Samuel Terry* v *John Eyres*, 16 April 1812, 5/1107–153; *John Bolger* v *George Crossley*, 28 April 1813, 5/1109–184 (affirmed, *George Crossley* v *John Bolger*, Court of Appeal, 14–19 June 1813, 4/1724).

28 *William Baker* v *George Crossley*, Court of Appeal, 5 August 1804, in King, n 19 above, 389; *John James* v *Charles Thomas*, 24 October 1811, 5/1106–222; *Sydney Gazette*, 26 October 1811, 3. On land law, see further, Kercher, n 2, 122–127.

29 *Thomas Sanders* v *Thomas Jones*, 6 July 1814, 5/1110–476.

unless the parties had a written contract which was entered in an official register. The first of these Orders was made in 1800, and it was followed by similar Orders in succeeding years.[30] The Orders were not completely ignored, as the surviving record books show, but they were avoided often enough to worry the governors. All they could do was impotently make further Orders, calling on the public and the courts to comply. Land titles were also frequently confused by bad surveying, sales of entitlements before the crown grant was made, and breaches of conditions under which sales or grants were made. This confusion was greatly compounded when people and even the courts refused to obey the registration orders, as *Sanders* v *Jones* shows.

In effect, there were four standards of conveyancing in the colony. There was no imperial reason why English law, which required a high degree of arcane formality, should not have been applicable in New South Wales, but no one in the colony's first 25 years ever suggested that it did. The governors created a second set of conveyancing standards which required registration of sales, preceding the first general registration law in England by 60 years.[31] The third standard was that of the ordinary people of the colony, who took a casual approach to owning the land that appeared to be endlessly abundant. This ignored the common law, the law of the governors' Orders and, of course, the titles of the native people from whom the land was originally taken. To ordinary colonists, land could be bought and sold quite casually, by the transfer of property in exchange for the crown grant document. The Court of Civil Jurisdiction mediated between these three standards to create a fourth one. It endorsed popular practices when it allowed informal sales of land, but if there had been a clash between the results of local practices and the register, the register may well have prevailed. In doing this, the Judge Advocates gave greater weight to local practices than to the Orders of their nominal superiors, the governors. The people of the colony held their land on chains of oral agreements and scraps of paper. It would have been more difficult for the court to unravel them by applying the Orders strictly, than to leave them alone. Many people had paid for the dubious titles and the civil court allowed their expectations to stand. Eventually the governors became resigned to this, and were left plaintively expressing the hope that people would obey their Orders. The limits on their autocracy were starkly clear. The first registration Orders were defeated by local practices.

Law drifting upwards

These examples of resistance to the Orders of the governors are only one way in which popular practices were enshrined in what passed for formal law in convict Sydney. From the beginning of the colony, there was also an unspoken debate between local practices and the formally applicable common law.

Even Richard Atkins, the tipsy legal amateur who presided as Judge Advocate longer than anyone else during the first 25 years and who took the law furthest from its English parent, knew that English law was formally applicable in the colony.[32] Despite that, he presided over many innovations, often letting popular practice drift into formal law. The rebel Judge Advocates, who were appointed by

30 See for example, *Sydney Gazette*, 10 July 1803, 1; HRA 1/4. 343–344.
31 See W.R. Cornish and G. de N. Clark, *Law and Society in England, 1750–1950* (London: Sweet and Maxwell, 1989) 172–179.
32 Atkins to King, 21 February 1801, in King, n 19 above, 14.

the illegal government which deposed Bligh, also claimed that they sought to apply English law. One of their justifications of the rebellion was that Bligh had allowed convict attorneys to invent 'horrible calumnies' in the courts.[33] They decided to follow the local legal customs that Atkins had indorsed, but were puzzled when they found that these practices did not always match English law.[34] Many of these innovations were ended by Ellis Bent, the barrister who succeeded Atkins as Judge Advocate after legality was restored following the coup. Bent was much more enthusiastic about following English precedents: he wanted English law to be his model as far as the circumstances of the colony allowed. At times, he even followed English court practice when it contradicted the formal charter which established his court.[35]

The governors also knew that they were required to follow English law, but said that they could not always do so, either because the law was too difficult to understand or because conditions were not the same in the colony as in England. Governor King said that he felt perplexed by the law as he 'tumble[d] over volume after volume' of English law and still found himself unsure of the correct legal answer to some questions.[36] He, too, was frustrated by the legal machinations of the convict attorneys, particularly George Crossley.

Until Judge Advocate Ellis Bent arrived at the end of 1809, Crossley was the most prominent voice in the colony for English legal propriety. In case after case, he urged the court to follow what he claimed were English precedents. He dressed up even minor cases as breaches of the Magna Carta, arguing that the governors were restricted by the rule of law even in a penal colony. This was a brave position for an emancipated convict to take, and it is clear that he felt some attachment to the values of the law as he understood it, even if he was always willing to manipulate it to his own ends. Deeply dishonest, he was by far the best lawyer in the colony before Bent. Until 1810, a convicted perjurer stood most strongly for English law.[37]

Crossley failed to keep the colony's law on the narrow path of what he considered English rectitude. His opponent in one vast case in the first few years of the nineteenth century was Simeon Lord, an ex-convict merchant who was acting as a lay lawyer for another merchant who was absent overseas. The case concerned the estate of the deceased insolvent John Stogdell, and was the first to be heard by the Privy Council on appeal from a court in Australia. In reply to Crossley's sophisticated legal arguments, Lord was proud to say that he did not base his argument on law cases, obsolete statutes and 'the Remoter pages of Antiquity'. Instead of engaging in the 'Subtle perplexities and Quibbles of Law', Lord claimed, he relied on justice and 'the Law of England, in its pure Construction and the law of equity and Reason in every sense'.[38] Even when he was arguing against technical English law then, Lord felt that it was important to stress that he was acting consistently with its general principles. This may have been little more than

33 Foveaux to Castlereagh, 4 September 1808, *Historical Records of New South Wales* (HRNSW), Vol 6, 733.

34 Grimes to Macarthur, Macarthur to Grimes, Bayly to Grimes, in Court of Civil Jurisdiction minutes, 16 March 1808, 5/1102, AONSW.

35 Bent to Cooke, 7 May 1810, HRNSW Vol 7, 371, and see 375.

36 King to Hobart, 7 August 1803, HRNSW Vol 5, 188–189.

37 See for example, Crossley's argument in *John Palmer, Administrator of John Stogdell* v *Simeon Lord, agent for Hugh Machin*, Court of Appeal, 7 October 1803, in King, n 19 above; *George Crossley* v *William Edwards et al*, Court of Appeal, 8 August 1804, in King, n 19 above.

38 *John Palmer, Administrator of John Stogdell* v *Simeon Lord, agent for Hugh Machin*, Court of Appeal, 7 October 1803, in King, n 19 above, 136, 177, 179–180.

a rhetorical device, but it was one that he thought was important. This debate about the extent to which English law could be adapted to local circumstances, this conflict between those who adhere to it strictly and those who just use it as a source of ideas when seeking a broader notion of justice, has been evident in Australian law ever since.[39]

The *Stogdell* case was one of very few where the parties or the earliest courts explicitly raised the question of the applicability of English law in the colony. In most cases, the first civil courts reached their decisions without explicitly recording why they decided as they did. Most court records merely stated the evidence and the result. Even when the courts' reasons were recorded, they rarely referred to the law. On the hundreds, perhaps thousands, of occasions when they reached decisions which were contrary to English law, they did so without saying that this was what they were doing.

In the cases when English law was not followed, the courts often followed, indorsed and created local legal customs. The most important example of this is debt recovery. David Collins, the first Judge Advocate, and his successor Richard Atkins presided over a debt recovery system which differed deeply from that of England except in form. English common law required debtors to pay their judgment debts in money, otherwise they were subject to coercive remedies, either against their property or against their person through imprisonment for debt. Both these remedies were formally exported to New South Wales; its First Charter of Justice provided for imprisonment for debt as well as the old property remedy of *fieri facias*, under which chattels were seized and sold for the creditor's benefit. As stated earlier, the Charter excluded bankruptcy and insolvency, the two primary devices which English law used to soften the harsh individualism of its basic debt recovery law. As soon as they failed to meet a judgment debt, insolvent debtors in the penal colony should have been imprisoned and left to rot in the Sydney Gaol.[40]

Atkins and Collins took this law and turned it on its head. They created a new debt recovery system which was adapted to the individual circumstances of debtors and their families. They allowed them to pay their debts off by instalments, stayed judgments until after harvests were collected, ordered payments in kind or even in labour, and secured the future payment of judgment debts over growing crops.

None of this was lawful by imperial standards, because the Charter allowed only *fi fa* and imprisonment. The nearest analogy in English law to the methods adopted by Collins and Atkins were those of the Courts of Requests.[41] They were small, local civil courts which were empowered to order payment by instalments and to make stays on execution. The New South Wales courts went far beyond these methods, and did so in cases involving thousands of pounds rather than the small sums to which these English courts were limited. The Courts of Requests do remind us, however, of the pluralism of English law in the late eighteenth century. There were many courts and many standards of law in England, which made the notion of transferring 'English law' to the colonies all the more complex. Those who referred to the matter explicitly usually assumed that the law to be transferred was that of the superior courts in London. In the case of debt recovery, the law to

39 See B. Kercher, *An Unruly Child: a History of Law in Australia* (Sydney: Allen and Unwin, 1995) chs 8 and 9.

40 On debt recovery law, see B. Kercher, 'An Indigenous Jurisprudence? Debt Recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction, 1788 to 1814' (1990) 6 *Australian Journal of Law and Society* 15; and see Kercher, n 2 above, ch 8.

41 See W.H. Winder, 'The Courts of Requests' (1936) 52 LQR 369.

be transferred to New South Wales was more obvious, because the Charter itself laid down the methods to be used in the Court of Civil Jurisdiction. On this issue, the imperial legal position was at its clearest, yet the local deviation from it was most stark.

The debt recovery law created by Collins and Atkins was consistent with their view of the colony's needs, and with the way in which the government's grain store conducted its business. The result was a handcrafted law in contrast to the mass-produced way in which the English superior courts operated. Despite the absence of bankruptcy and insolvency, very few New South Wales debtors spent long periods in gaol. Wealthy individuals, in particular, benefited by locally created, and technically unlawful, insolvency provisions. Ellis Bent ended all of this in 1810, when he ordered that judgment debts were to be payable within a few days of judgment being delivered, and had to be paid in sterling. He also ended the informal bankruptcy mechanisms which had allowed George Crossley, among others, to attempt to rehabilitate himself. Bent's enforcement of the formal absence of bankruptcy and insolvency law, due to his strict attachment to imperial propriety, led to a much harsher law than in England.

The same kind of flexibility was shown towards married women in the first 25 years. Under English common law, they were unable to act as freely as men or their unmarried sisters. The common law on this issue was not always followed in England however,[42] nor was it in New South Wales. The colony's courts and governors allowed married women, whether the wives of convicts or not, to hold liquor licences, sue in the courts, run businesses and even to own land. This too, was in response to local customs and practices. In 1810, George Crossley noted that

> a Custom prevailed in this Colony from the time it was first planted as an English Colony, that a free married women might carry on Trade as a Feme Sole tho' joined with her husband. And such custom was carried so far in this Colony that in many Cases such married women joined their husbands in Securities for Money or Goods purchases — and held lands and Effects separate and independant of their husbands as separate Estates.[43]

This reinforced and reflected the remarkable egalitarianism of a penal colony under the rule of military and naval governors. Wives, like convicts, were deeply involved in daily commercial life, despite the formally applicable law of England.

The adoption of popular customs

The absence of written reasons for the decisions made by the Judge Advocates means that in most cases we do not have their explanations of why they departed so far from English law. This contrasts with the colony under professional judges and lawyers. The constitution of New South Wales was completely restructured by an imperial statute of 1823, 4 Geo IV c 96. This ended the period of frontier law and the governors' autocracy, by establishing a legislature and a permanently constituted, fully professional Supreme Court. This new court usually supplied reasons for its decisions, even if few of its decisions in the first decade have been formally reported. In 1828, a new imperial statute, the *Australian Courts Act*, 9

42 See M. Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1985) 3–4.

43 *David Dundas Esq* v *Elizabeth Driver, executrix of John Driver*, 1810, Case Papers, 5/2278; and on women in early New South Wales, see Kercher, n 2 above, 65–75.

Geo IV c 83, made utterly clear that the Acts of the colonial Legislative Council were not to be repugnant to the law of England. The Act empowered all the Supreme Court justices to keep an eye on this.

One of the few reported cases in the first decade of the new Supreme Court was *Macdonald* v *Levy* (1833) 1 Legge 39, which shows how English trained lawyers debated the issue of the adoption of popular practices. The case turned on the applicability of English usury law in New South Wales. The maximum rate the English Act allowed was five per cent, but the New South Wales Supreme Court heard evidence that the custom in the colony had always been to allow much higher rates. The question was whether this local practice was lawful. The minority judge, Burton J, held that English law was applicable on this point and that the local practice was thus unlawful. His decision was based on a study of the records of the old Court of Civil Jurisdiction, the court which is the focus of this article. The records showed him that the old court had habitually allowed eight per cent, following the Orders of the governors which fixed that as the maximum rate, and that in some cases under Ellis Bent it allowed 12 per cent. Was this evidence of an authorised custom, an accepted local variation from the common law? According to Burton J, the answer was no. He thought that far from these decisions being evidence of a custom, they merely showed how lax the courts had been in the first 25 years. To be incorporated into law, Burton J stressed, a custom had to have been in existence 'as long as the memory of man runneth' (which the common law fixes at the year 1189). Nothing which was done in the colony of New South Wales went back to the time before memory, and so these practices were merely unlawful, said Burton J. This meant that only English practices could be elevated into formal law, not those of any British colony. The English Act was in force from 1788, Burton J said, and the Orders of the governors allowing a higher rate were invalid. Any inconvenience this may have caused was irrelevant. He said 'I have no power to bend the law; transactions in society must be adapted to the law; it is not in Judges, but in Legislatures to adapt the law to the state of society'.[44]

There was more to this decision of Burton J than his strong belief in the values of English law and an early example of unyielding legalism: it also suited his personal interests and his hostile views of the colony and its legal system. Since his arrival in the colony, he had been writing to friends that usury and extortion were the rogue's honesty in New South Wales and that he himself was troubled by high interest rates. He also said that the colony's judges and legal profession could only be described as Botany Bay lawyers. In his eyes, no term could have had a stronger pejorative meaning than this expression, one which emphasised the degradation of the penal colony. On this point of usury, his legalism and his hostility towards local legal ideas combined in an utter rejection of the colonial experience of law.[45]

The majority, Forbes CJ and Dowling J, found that the English Act was not applicable in the colony and never had been. Forbes CJ found that the New South Wales courts had always imposed interest at a reasonable rate, and had always allowed more than five per cent. This was not a custom, he said, but an accepted

44 *Macdonald* v *Levy* (1833) 1 Legge's Reports 39, 49.

45 Burton's personal views of this case and of law in the colony are exposed in his letters to his brother and friends, which are in the New South Wales Bar Association Library, and in Burton to Austen, 19 June 1833 and 30 September 1833, document 2668, ML. In public, the expression of his opinion of the colony was more restrained. See W.W. Burton, 'Notes for an Address to a Petty Jury' (1835) in Forbes' Papers, 'Governor Darling and the Judges', A746, ML.

usage which was not inconsistent with the general law of England.[46] There was no need for usages to have been in existence since the immemorial past. Although usages operated only to the extent that they were consistent with positive law, this caused no problem to Forbes CJ: he held that the English statute was inapplicable to the colony's circumstances. That was the main point of difference between him and Burton J. Forbes CJ held that the local usage on this point was an implied part of all contracts entered into in the colony. His flexibility appears to have been inspired by that of Lord Mansfield; one of the great traditions of the common law, its adaptability, allowed it to be used to create something new in new societies.[47] This was not repugnant to the law of England, Forbes CJ implied, but an expression of its strength. His decision was consistent with the loose notion of judicial precedent which predominated across the common law until the later nineteenth century.[48] It was Burton's strictness which was out of step at the time, not the flexibility shown by Forbes.

This willingness to adapt to local practices may have been related to the previous experience of Forbes CJ, who trained in England but practised in the colonies. By birth and residence, he was British but not English, even if he referred to England as 'home'. He had formerly held a legal position in Bermuda and was Chief Justice of Newfoundland immediately before taking up the position in Sydney. He recognised that there was considerable variation across the empire on interest rates and on much else. Although he strongly indorsed the general applicability of English law to the colonies, he thought that this did not require slavish adherence to all English rules. However he thought that colonial judges had no right to create new and different rules. They could omit, but not create.[49]

In the colony's foundation years, this division between strictness and flexibility was represented by Ellis Bent and Richard Atkins, yet even Bent must have accepted that the usury Act was inapplicable. This shows that he was not as rigid as Burton J. Not every judge shares an equally strong impulse to follow inherited legal cultures.[50]

Law, resistance and ignorance

These departures from imperial law were not unique to early New South Wales. Other writers have reached similar conclusions about the law of other newly established colonies. Together they show that the rough law of amateur judges at the frontier often had a strikingly similar quality, whether it was in newly acquired

46 On the difference between customs and usages, see *Halsbury's Laws of England* (London: Butterworths, 4th ed, 1975) Vol 12, par 405; A.K.R. Kiralfy, *Potter's Historical Introduction to English Law and its Institutions* (London: Sweet and Maxwell, 4th ed, 1962) 291–292; A.K.R. Kiralfy, 'Custom in Mediaeval English Law' (1988) 9 *Journal of Legal History* 26; and see A. Loux, 'The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century' (1993) 79 *Cornell Law Rev* 183.

47 This seems clear in *Doe ex dem Clark and another* v *Smithers and another*, an unreported decision made by Forbes CJ in the early 1830s: there is a copy of this decision in Forbes' Papers, filed with the 'Jane New Case' papers, A742, ML.

48 See H. Berman and C. Reid, 'The Transformation of English Legal Science: from Hale to Blackstone' (1996) 45 *Emory Law Journal* 437.

49 See *R* v *Farrell* (1831) 1 Legge's Reports 5, 9.

50 See, seemingly to the contrary, A. Watson, 'A House of Lords' Judgment, and Other Tales of the Absurd' (1985) 33 *American Journal of Comparative Law* 673. The article contains a strong version of Watson's argument: see W. Ewald, 'Comparative Jurisprudence (II): the Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489.

California, early Connecticut, or early New South Wales. The records of the much older, but still pre-colonial Newfoundland show the same tendency.[51] In all these places the judges reacted in similar ways to similar conditions, particularly over debt recovery matters. The picture is not simply one of law trickling down from empire to outpost, from the eastern United States to its new acquisition in California, or from London to Sydney or St John's, but one of a network of influences and resistance. In all of this, however, we should not underestimate the importance of individuals in small societies. Differences between frontier societies and their law are as important as similarities, and the differences were those of individual inclinations and social circumstances. Nor was this ever a process of simple, unprecedented invention by those at the frontier. It is also important not to overlook the strength of inherited law, especially in its language, concepts and unconscious habits. The reception of law should be seen in the context of imperial relations, and the ever changing but ever present, delicate dance at the frontier between local conditions and inherited traditions.[52] In the nineteenth century at least, European dancing required at least two partners; as we know from the BBC's production of *Pride and Prejudice*, it often involved many more than that.

When there was law there was often resistance as well, and this ambivalent attitude to law and authority was the key to understanding the legal culture of early New South Wales. The resistance was not usually violent, as was the defiance shown by the Eora and other native peoples whom the colonists forced aside. On rare occasions there was violent white resistance, such as in the Vinegar Hill convict rebellion of 1804; the Irish convicts who took part in it completely rejected British law and rule.[53] Convict resistance to the discipline of their masters usually took more subtle forms however, including acting on their own expectations about appropriate work, expectations which were based partly on the labour practices of free workers in Britain and Ireland.[54] This was similar to the resistance shown by all groups in the colony to the principles of civil law, concerning contract, tort and debt recovery, which are examined in this article.

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51 D. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821–1846* (Norman: University of Oklahoma Press, 1987); B.H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: University of North Carolina Press, 1987); C.H. Dayton, *Women Before the Bar: Gender, Law, and Society in Connecticut, 1639–1789* (Chapel Hill: University of North Carolina Press, 1995); F. Forbes, 'Decisions of the Supreme Court of Judicature in Cases Connected with the Trade and Fisheries of Newfoundland 1817–1821' A740, ML. For another example of colonial judicial flexibility, see B. Hibbits, 'Progress and Principle: the Legal Thought of Sir John Beverley Robinson' (1989) 34 *McGill Law Journal* 454. On similarities between colonial statutory law, see J. Finn, 'The Inter-Colonial Element in Colonial Statute Law: an Inquiry into Aspects of the Legislation of the British Settlement Colonies 1790–1900' (PhD thesis, University of Canterbury, NZ, 1995).

52 On the frontier thesis of history, see F.J. Turner, *The Frontier in American History*, (foreword by R.A. Billington) (New York: Holt, Rinehart and Winston, 1962). for critiques of it, see R. Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (London: Jonathan Cape, 1969); and P. Novick, *That Noble Dream: the 'Objectivity Question' and the American Historical Profession* (Cambridge: Cambridge University Press, 1988). The post-Turner frontier thesis offers much to colonial legal history: see W. Cronin, G. Miles and J. Gitlin (eds), *Under and Open Sky: Rethinking America's Western Past* (New York: Norton, 1992), especially the chapter by J. Gitlin, 'On the Boundaries of Empire: Connecting the West to Its Imperial Past' 71.

53 See P. O'Farrell, *The Irish in Australia* (Sydney: UNSW Press, 1986) ch 2; L. Silver, *The Battle of Vinegar Hill* (Sydney: Doubleday, 1989).

54 A. Atkinson, 'Four Forms of Convict Protest' (1979) 37 *Labour History* 28; and see Byrne, n 10 above. On the complexities of regulation and its resistance, see also T. Loo and C. Strange, 'The Traveling Show Menace: Contested Regulation in Turn-of-the-Century Ontario' (1995) 29 *Law and Society Review* 639.

Many of the colonists still considered themselves British, even those exiled for life, yet they recognised that their interests and needs were not always met by English law and authority. Their opposition was sometimes expressed as a refusal to follow English or even local law. Elsewhere, law was used in the opposite way, as a tool in opposition to authority. Even though Crossley provided legal advice to Bligh, his insistence on English legal principles was a constant challenge to the excessive use of authority by the governors.[55] Resistance to the governors and resistance to formal English law were not always the same thing.

Conscious resistance to law was not the sole explanation for colonial legal innovation; we should not underestimate the importance of legal ignorance. Ordinary people were not necessarily aware that their practices were in breach of the common law, and in frontier times not even the judges and governors always knew what that law required them to do.

Nor was explicit resistance to authority and the law confined to the ordinary population. The clearest example of defiance of authority in early New South Wales was when the military hindered the activities and policies of Governors Hunter, King and Bligh, at first through litigation and eventually through rebellion. Odious as their self-centred activities may seem now, they set a pattern of opposition to the autocracy of the governors, and they introduced the notion of the governors being subject to the rule of law. The hypocrisy of this was shown when they took their mutinous action to overthrow Bligh, but the rule-of-law precedent had been set. Even the judges showed some conscious resistance to imperial authority and law, when they deliberately ignored the Orders of the governors, the terms of the First Charter of Justice, and what they knew to be the applicable law of England. Sometimes the judges followed the general provisions of English law in rejecting the governors' Orders or the Charter, but sometimes they simply followed their own notions of justice, rejecting both law and authority.

It is arid to point out that much of this was unlawful from an imperial perspective. That was certainly so, but this new mix of law was accepted by a new legal system, that of the colony itself. There were two legal systems, one in London and the other in the Australian bush. They were connected less closely than lawyers and historians may have assumed. Using 'custom' in a broad way which would have annoyed Burton J, in its civil courts before the arrival of Ellis Bent at least, early New South Wales had a legal system which was partly inherited, and partly customary when locally developed practices were indorsed judicially.[56] To a significant extent, frontier law was a blend of custom as practice and, in an inarticulate way, custom as a source of what passed locally for formal law.[57] Those customs, however, were partly based on what was remembered from England.

The outcome of this tension between inheritance of English law and resistance to it was that the law as decided by the colony's common law in its first 25 years was a mixture of the inherited common law and statutes of England, the Orders made by the legally amateur governors, the paternalism of the disgraced aristocrat Atkins and the professionalism of Bent, and the sometimes contradictory values of the

55 This was most evident in *George Crossley* v *Thomas Smyth, D'Arcy Wentworth and Pat Cleary*, *Sydney Gazette*, 26 June 1803, 2 and 24 July 1803, 2; and Court of Appeal, 14 March 1804, King, n 19 above, 247.

56 See A. Watson, 'An Approach to Customary Law' [1984] University of Illinois L Rev 561; and Loux, n 46 above. For Bentham's positivist emphasis on the recognition of custom, rather like Watson's, see G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) ch 7.

57 See Loux, n 46 above. See also S. Diamond, 'The Rule of Law Versus the Order of Custom' in R.P. Wolff (ed), *The Rule of Law* (New York: Touchstone, 1971); and Thompson, n 10 above, ch 3 especially.

colony's people. The key factors which led to the difference between English law and that of its bizarre penal colony were the relative lack of professional legal thought in the colony,[58] its distance from imperial rebuke, and the strikingly different social, economic and political conditions of the new colony.

Positivist legal history, based as it is on the assumption that all rules of law were handed down or authorised by the imperial centre, can do little to help us understand this mixture of local practice and two rather loosely connected sets of laws. The trickle down theory as practised by an earlier generation of legal historians in Australia, would have us believe that the only important historical question for colonial legal history was whether certain legal actions and decisions complied with the formally applicable law of England. This article argues by contrast that in analysing the law of early New South Wales (or any other frontier law), we need to recognise that there was often a confusion between law and custom, especially when the legal players themselves drew no clear distinction between the two. This difference was drawn more sharply after 1824, when the frontier legal period was finally over and English trained lawyers appeared before an English trained bench to argue cases such as *Macdonald* v *Levy*. Even after then, however, we should not stop looking for evidence of difference between English and local law, and for traces of the influence of law as practice. The positivist notion of law being handed down from above is little more convincing when applied to today's law than when applied to frontier law. Formal law may now be more explicit about its own view of its sources than frontier law, but even modern commercial law is still as much a matter of practice as state imposed rules.[59]

We should be careful about nationalist impulses which would have us celebrate popular local practices merely because they opposed the laws of England. Not all customs were benign from the perspective of the late twentieth century. For example, Thompson's *Customs in Common* refers to wife sale,[60] a practice which was also carried on in convict Sydney when Ralph Malkins sold his wife for £16 plus some lengths of cloth.[61] This warning is most important when applied to colonial attitudes to the Aboriginal population of Australia. One common practice was to treat them as if they had no rights at all. Just before seven men were hanged in 1838 for the mass-murder of Aborigines, some of them confessed that they had committed the act, but had not known that it was illegal to do so as it had been done so often before. It was the common law and the strict Englishness of the trial judge, Burton J, which sentenced them to death, not local attitudes.[62] Popular resistance to imperial law on this issue continued through further massacres well into the twentieth century, which shows that those who resisted formal, imperial law were not always on the side of the angels.

A search for causal links between law and society often results in an endless circle, like a puppy chasing its tail. On some points the initial impetus for social

58 Which Watson would emphasise: see Ewald, n 50 above, 499–500.

59 See L. Fuller, 'Human Interaction and the Law' in Wolff (ed), n 57 above; and on commercial law, see for example, T.M. Palay, 'Comparative Institutional Economics: the Governance of Fail Freight Contracting' (1984) 13 *Journal of Legal Studies* 265; O. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*, (New York: Free Press, 1985); V. Goldberg, 'Price Adjustment in Long-Term Contracts', [1985] *Wisconsin Law Review* 527; L. Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *Journal of Legal Studies* 115.

60 Thompson, n 10 above, ch 7.

61 *Sydney Gazette*, Supplement, 14 September 1811, 2.

62 See R. Milliss, *Waterloo Creek: the Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales* (Ringwood: McPhee Gribble, 1992) chs 17–18; and Kercher, n 39 above, 12–15.

change in early New South Wales was a specific legal decision, such as *Cable [Kable]* v *Sinclair*, the 1788 decision in favour of the two convicts who had lost their baggage. That allowed all convicts to be treated in the civil courts as if they were free. It was a major influence on the colony's surprising egalitarianism, which allowed a few convicts, including Henry Kable himself, to become wealthy through trade. On other points, the initiative was taken by ordinary people when they imposed their beliefs on reluctant governors and judges, such as in the land conveyancing cases. In the latter cases there was a complete inversion of the imperial legal hierarchy, under which the institutions of English and imperial law were supposedly on top, passing laws for the lesser beings beneath.

In most cases, however, the initiative cannot be teased out so easily: the law in early New South Wales cannot always be distinguished from popular practices even at the level of judicial decision making. Why was the debt recovery law as flexible as it was, and as careful in its protection of debtors' interests? Partly this was because of the political balance which the governors and judges wished to strike between farmers and officers and because of their paternalist protection of the poor, but partly too, it was because of what the poor expected of those who held power over them. Causation is less useful as an analytical device in these circumstances than the notion of seeing the law and courts as a functioning system within a bustling trading community. This is rather like Said's contrapuntal reading of the relationship between culture and imperialism, in its emphasis on the blend between imperial ideas and those of the often unnoticed resistance to empire.[63]

Legal ideas clearly did travel either upwards or downwards in some cases, but the direction was unclear in very many others. They swirled around, drifting through small farms, pubs, the warehouses of Simeon Lord, military barracks, the sharp self-interested mind of George Crossley, the alcoholic haze of Richard Atkins, and the angry minds of the wretched seal-killers who spent a winter without shelter on the sub-Antarctic Macquarie Island. Resistance to authority was not the least important part of this process.

63 E.W. Said, *Culture and Imperialism* (London: Vintage, 1994) especially 59–60, 78–79, 175, 225, 312–313, 337, 384. Said says little about Australia, however, and nothing of the complexities of its relationship with the British empire. There were several levels of colonisation that affected Australia: of the Irish even before they were transported and then in the way they were treated in the Australian colonies; of the colonists generally, the currency lads and lasses; and of the Aboriginal inhabitants whose land was invaded. Each group had its own patterns of resistance.