- Law[yer]'s History, Conversationally Speaking
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LAW[YER]'S HISTORY, CONVERSATIONALLY SPEAKING

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I am delighted to be speaking in this forum today. Alex Castles was such an important presence in the early years of the Law and History conferences that it is only right that we should honour his contribution in this way.

Alex's presence was so valuable because of his commitment to the project of Law and History, a commitment evident in the publication of his pioneering works in Australian legal history. I was asked to review Alex's history of South Australia (co-authored with Michael Harris) for the journal *Australian Historical Studies* and in preparing for this talk I went back to my review to see what I thought at the time.

I clearly liked the book: I described it as 'readable,' 'fluently written ... liberally illustrated, its prose enlivened by the occasional jibe at the self-importance of law and its practitioners'. I did point out there was a 'decidedly comfortable whiggish feel to the story' of South Australia's modernisation and I blush to quote that more youthful arrogant self today, because I also said 'the study of law in history is too important to be left to lawyers'.[1]

I hasten to point out that I was writing to an audience of historians, trying to urge more engagement with legal research by historians (they had much to add, I said). My thought was that law as a discipline needed to be researched and interrogated by non-lawyers for a truly critical interdisciplinary study because legal education taught lawyers to talk law's conversation and it was this which needed critical analysis. It was a general political remark not specifically addressed to Alex's work though it did arise from the whiggish narrative and the sense I consequently had that 'critical' had the limited meaning of reform not revolution. That Law's conversation is narrow and insufficiently critical is a thought that can stand some further investigation.

I think it is significant that David Neal, in reviewing Alex's first book, *An Australian Legal History,* for that same journal, while praising the book's pioneering significance and pointing out where he thought it could have been stronger, referred to the work of young historians — Stephen Garton, Mark Finnane, Judith Allen — as examples of the kind of historical research of law that was and should be undertaken.[2]

However legal educators did not train students in critical skills of historical analysis and these young scholars did not think of themselves as part of the Law and History movement if I can call it that. They did not see themselves as focussing on Law and its history as a practice or a discipline,

but rather they were working as social historians (in the tradition of E P Thompson) drawing on the insights of Michel Foucault, seeing law as power deeply embedded in the institutions and practices of daily life. Laws, their policing and enforcement, were clearly crucial to the everyday lives of men and women, the bad, the mad and the just plain ugly.

This recognition of the significance of law to society, while it owed much to Thompson's work on the Black Act[3] and Foucault's work on sexuality and punishment,[4] (and Douglas Hay's book[5] was on the historian's bestseller lists at that time) was not in itself a new departure for historians. Legal records have always provided source material for social and political historians to analyse. As Carolyn Steedman has said, the courts were where the poor told their stories,[6] and historians are tellers of people's stories.

But the questions these historians were asking of their source material was not the same as lawyers were asking. Our goal in setting up the Law and History conference (and I am giving myself undeserved credit here as I came on the scene once the organisation for the first conference was already in place) was to bring these two different sets of questions into conversation.

We were concerned that Law remained a discipline apart and above. Our view of the embeddedness of law in the social and cultural history of the everyday was partly acknowledged by attempts to call the conference the Law IN History conference, but that too was problematic as it also placed Law at the centre of research and didn't give scope for the importance of history through law, of history's law if you like, ie, of how historical context/discourse/debate has constituted law and how law tells us about the construction of history as an evidentiary discipline of memory, artefact and written documentation. A good example of this is the work being done today by historians and lawyers in native title cases. History, too, was standing apart as a discipline and my review of Alex Castles' work on the history of South Australia was an attempt to alert historians to the need for inter- or multi- disciplinarity.

My question in my own research has always been how has law and legal change been important to women's working experiences and economic independence? That has also meant searching out the meaning of judicial and doctrinal changes as well as legislative initiatives and feminist campaigns for law reforms, but the end focus of my research has been the meaning for WOMEN of law's history, not the meaning for LAW of women's history.

Yet can I be so adamant about this difference? Surely women's history – eg, in the campaigns by women to change specific oppressive laws – also tells us much about law's history too? so that the two are intertwined, mutually constitutive and revealing. From a narrative of labour legislation as an inhibition on women's freedom to work, (ie, written of the law from outside the law). I am moving – through a closer examination of the meaning within the law, ie, beneath the judicial interpretation of married women's property – towards a recognition of the inherent historicity of law's construction. It seems that feminist thinking on injustices to women informed judicial thinking (and therefore doctrinal change) in surreptitious and subterranean ways even in the absence of feminist campaigning because the ideas were in the air and judges occasionally breathed the air with ordinary mortals (especially their wives and daughters – the private life in judicial biography).

Problematising and contextualising Law in its historical base – interdisciplinarity – was the foundation goal of the conference and the organisation of ANZLHS as it has become. Studying law has, I am suggesting, also problematised history for historians. The institutional certainties of a feminist movement with specific goals which were or were not achieved in specific reforms, and of law courts and statutes which were or were not visibly responsive to those goals, has given way to a more nuanced and subtle reading of the dialogue between formal and informal structures, popular culture and high legal culture as two sides of a same coin, or mutually informative practices.

'Lawyer's history,' I wrote in 1989, was 'dry, dispassionate, lacking in human agency and preoccupied with questions of legal interpretation ... heavily reliant on traditional legal sources, statutes and case records'.[7] I was not claiming that Alex Castles' narrative of SA was dry and

abstract. Rather I saw it as a valuable reference tool, packed with dates, names, legislative enactments, parliamentary changes and one in which individuals played a large part. I did however want more.

The book's strength, I said, lay in its contribution to the debate on Australian colonialism – the unequivocal extension of English law into the Australian colonies. Castles took the view that the colonies followed English precedents slavishly, a theme David Neal took up at length in his review. How much a distinct Australian legal culture developed apart from Mother England is a question which has continued in subsequent research, notably by Bruce Kercher and others. Though Neal also claimed that Castles' earlier book was thorough, authoritative and well-written, he found that on this particular issue Castles 'lapsed into the narrow style of jurisprudence which only considers case law and legislation' (Lawyer's history). Surely, Neal said:

legal culture extends beyond the text of law to encompass its administration, its officials, its accessibility and legitimacy, the level of litigousness, and so on.[8]

This was the work that had yet to be done by Australian researchers, but it was research for which Castles had laid a comprehensive and solid foundation.

That theme of colonialism and imperialism is very much alive today as our last few conferences have shown,[9] but it has a new, gendered dimension that we weren't talking about in the 1980s. Colonialism has been taken up by feminist scholars exploring settler colonialism and issues of race and gender in the creation of nation-states and the writing of national histories.

'Law's empire' is not only a concern of feminists but the feminist contribution is I think worth considering at greater length because of the particular insights that come from the intersection of race and gender oppression. '[T]he very best feminist legal scholarship' Martha Fineman has said, 'is about law in its broadest form, as a manifestation of power in society, and for the most part it recognizes that there is no division between law and power'.[10] As Daiva Stasiulis and Nira Yuval-Davis have said, 'imperialism created new sites for gender struggles and relations between and within' indigenous communities and European men and women.[11]

Ann Curthoys has pointed out how our preoccupations with establishing an Australian-centred history as a departure from the older forms of history-writing of Australia as purely an epiphenomenon of British history, meant we lost for a while any international and comparative perspectives. These, I believe, we are retrieving through an enlarged and expanded empire studies which have us recognising common experiences, common problems and very often, common solutions. It is in the coming together of Law and History that these comparative studies are, in my view, at their best. Feminist attempts to grapple with the issues of race and gender have, according to Curthoys, led to a questioning of some of the basic questions in history: the relation between present values and the way we write about the past, the responsibilities historians have when writing about cultural groups other than their own. Problematising racial categorisation, as Constance Backhouse has done in her book,[12] has led many historians to ponder the culturally specific nature of history itself. Considering the imperialism of law in native title claims has led others to question the very nature of historical enquiry and method.

'Law' and 'History' are culturally-specific ways of knowing and ordering experience, inherently implicated in relations of power. Most of the world's people live in situations where colonialism and race are defining features of their everyday life.[13] As we move into a globalised post-colonial world, for indigenous people and for colonisers, these power relationships are being amplified in new and sometimes confronting ways.

Today the disciplines of law and history are being brought together in new and exciting ways. As concepts like 'land', 'native title', 'citizenship' and 'human rights' are contested in courtrooms, parliaments and the media, they challenge old historical certainties and bring new demands for a professionally-active historical profession. Law has never been a marginal player in imperialism: in some specific instances it has been legal codes alone which have created boundaries

and empowered the enforcement of differentiation.[14] But history, too, has been partial and powerful in creating knowledge of past (in) justice(s) and territorial expansions. Scholars are increasingly turning their attention to questions of colonialism and post-coloniality, to the meaning and consequences of imperialism, and to the dynamics of imperialist institutions and the colonial enterprise. As they do they encounter the conjunction of the disciplines of 'law' and 'history' as one such matrix of imperial power.

The appearance of Alex Castles' book on Australian legal history in 1982 led David Neal to claim:

There can no longer be any excuse for the lack of courses on Australian legal history. Nor should Australian legal history courses [be] of the dry constitutional sort ... [15]

Today I am wondering, is Law – law's history – still lawyer's history, a discipline that continues to converse only with itself? While we in Australia and New Zealand take pride in the growing success of our conference and organisation, are we at the same time deluding ourselves about our success in transforming the narrowness and insularity of law's conversation? Is Law's power to absorb other disciplines including History still the obstacle we have to overcome? Are we in short having an impact so that History is rewriting the Law schools' curriculum? or Law is incorporated as a Humanities subject in the Arts faculty curriculum?

There is I think a lingering question we must ask ourselves: whether interdisciplinarity is really achievable at an institutional level. In a paper recently delivered to the Canadian Law and Society Association conference in Lake Louise, Christopher Tomlins recounted the history of Law's encounter with the social science disciplines in the USA.[16] He spoke of the growing body of scholarship disillusioned with the Critical Legal Studies' movement's ability to move Law out of itself. He spoke of Law as an 'ambitious, resilient, and where necessary adaptive disciplinary discourse' that uses these encounters to strengthen itself but not in ways critical scholars hoped and intended (see eg, the continuing masculinity of law's power).

Clearly we have much work to do – especially in bringing historians to write law's history (or history through law), to strengthening historical analysis and to expanding awareness of law's historicity as a discipline without at the same time simply strengthening law's conversation with itself. Yet it is also time to pause and recognise that now, twenty years since Alex Castles' *An Australian Legal History* was published and the first Law and History conference was held at La Trobe, law's history in Australia has advanced thanks to his ambition and vision that it was possible and his pioneering work in showing the way. In conclusion I can only again quote David Neal, 'Thank you Alex Castles'.

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[*] Reader in History, La Trobe University. This is a transcript of a paper delivered at the plenary panel devoted to the scholarship of Alex Castles, at 'Those Lasting Alliances of Habits': 19th Annual Law and History Conference, Humanities Research Centre, Canberra, July 2000.

[1] Diane Kirkby, 'Book Review' (1989) 23 *Australian Historical Studies* 484, 485.

[2] David Neal, 'Book Review' (1983) 20 *Historical Studies* 621, 623.

[3] E P Thompson, *Whigs and Hunters: the origin of the Black Act* (1975).

[4] Michel Foucault, *Discipline and Punishment: the Birth of the Prison*, trans. Alan Sheridan (1979).

[5] Douglas Hay, *et al*, *Albion's fatal tree: crime and society in eighteenth-century England* (1975).

[6] Carolyn Steedman, seminar delivered at La Trobe University, Melbourne, 1997.

[7] Kirkby, above n 1, 484.

[8] Neal, above n 2, 623.

[9] Publications from which include Diane Kirkby and Catharine Coleborne (eds), *Law History Colonialism: The Reach Of Empire* (2001); A R Buck, John McLaren and Nancy E Wright (eds), *Land and Freedom: Law Property Rights and the British Diaspora* (2001).

[10] Martha Albertson Fineman, 'Introduction' in M A Fineman and N S Thomadsen, *At the Boundaries of Law: Feminism and Legal Theory* (1991) xvi.

[11] Daiva Stasiulis and Nira Yuval-Davis, *Unsettling Settler Societies: Articulations of Gender, Race, Ethnicity and Class* (1995).

[12] Constance Backhouse, *Colour-coded: a legal history of racism in Canada, 1900-1950* (1999).

[13] H Afshar and M Maynard (eds), *The Dynamics of 'Race' and Gender: Some feminist Interventions* (1995) 1.

[14] Ann Laura Stoler, *Race and the Education of Desire: Foucaults History of Sexuality and the Colonial Order of Things* (1995) 47; for an example see Peggy Brock, 'Aboriginal families and the law in the era of assimilation and segregation, 1890s-1950s' in Diane Kirkby (ed), *Sex Power and Justice: Historical Perspectives on Law in Australia* (1995) 133-49.

[15] Neal, above n 2, 623.

[16] I am grateful to Chris Tomlins for making his paper available to me.

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