

## Jane Adams

### “Childless wives and gene donors”: the legal history of artificial insemination in New Zealand

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The introduction of an *in vitro* fertilisation programme to New Zealand in the early 1980s ignited strong debate over the many legal and bioethical issues that this new form of assisted reproductive technology presented. New Zealand’s legal community had, however, been engaging with assisted reproductive technology and the broader issue of infertility well before the advent of *in vitro* fertilisation. From as early as the 1950s, artificial insemination – a far older form of assisted reproductive technology – began featuring in New Zealand’s divorce law legislation, cases and scholarship. In this paper, I will explore the early history of artificial insemination in New Zealand and will consider what it reveals about contemporary legal responses towards marriage, gender roles, adoption and infertility.

**Jane Adams** graduated with a Bachelor of Laws and Arts (Hons) from the University of Otago in 2001. My History Honours dissertation – a case study of “criminal lunatics” at the local Seacliff Asylum – was awarded the ANZLHS Undergraduate Essay Prize in 2002. I practised commercial law at Anderson Lloyd in Dunedin for two years before relocating to Melbourne in 2005. There I practised commercial property law at Herbert Smith Freehills for five years. In 2011 I returned to Dunedin with my family to commence my PhD on the history of infertility in New Zealand since the 1950s. My supervisors are Professor Barbara Brookes (History) and Associate Professor Colin Gavaghan (Law).

# **Noura Mohammed Altwaijri**

## **Islamic Architectural Art and its followed regulations**

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The creation and beauty represent an essential dimension to the civilization in general, where that civilization which is free of means of beauty doesn't response to the human sense and doesn't meet his imagination.

This paper will handle the importance of architecture as a pillar in culture and civilization, as well as the documentation of the Islamic architectural creation art in the field of civilization and construction through handling the following points:

1. The features of the Islamic art represent in the beauty of formation, seeking assist of imagination, and creation elements, existing wide parlor surrounded by buildings known with the name of "Sahan", that is considered the core element of the Islamic architecture designing.
2. The Muslims contribution in the field of architecture technology including the domes, posts, collars, dams, arches and castles technologies.
3. The elements of the Islamic Art include varied ornamentations represent in forms of human, animal, forms combine between animals, plants, and birds, as well as engineering forms.
4. Islamic Cities Planning, types of housing, the organizational roles for the architectural planning of the Islamic cities that should be applied such as neighborhood rights, and many other rules.
5. The followed regulations in the Islamic architectural construction, including the followed laws in the homes, schools, markets, hospitalized basins, and industrial cities.

**Noura Mohammed Altwaijri** is a professor of History and Islamic Civilization, as well as the study and analysis of Manuscripts at Princess Noura Bint Abdulrahman University, Riyadh, Kingdom of Saudi Arabia. Her major is History and Islamic Civilization; the study and analysis of Islamic manuscripts, and her minor is History of Andalus and the Islamic Maqrib. Professor Altwaijri supervised a number of Master and Ph.D theses. She has a numerous research papers that have been published in refereed journals. She had been assigned by a number of Academic establishments and universities to assess a number of academic publication addressing Islamic History and Civilization. Professor Altwaijri is a member of Arabic and Saudi Islamic committees. Finally, Professor Altwaijri participated in a number of international and local conferences as well as heading a number of social and scientific committees.

## Fady Aoun

### Violent, Racist and Sexist Trade Marks in the Anglo-Australian Public Sphere.

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This talk focuses on an innocuous statutory provision in trade mark law that (supposedly) militates against the registration of scandalous and offensive trade marks. Recognising that this provision (and law more generally) can serve as an instrument of liberation as well as oppression, historical records suggest that this provision has mainly served as an instrument of oppression for minority groups. In other words, rather than preventing the dissemination of dehumanising images of minority groups (eg indigenous Australians, Maori, Native Americans) as they apply to consumer goods, its underutilisation in fact encouraged the proliferation of such scandalous and offensive marks in the Anglo-Australian public sphere. After briefly documenting various historical examples of violent, racist and sexist marks, this talk engages in a detailed deconstruction of the bitter trade mark dispute in late nineteenth century colonial Australia between the proprietors of Darkie Brand® Soap and Scrubbo® Brand Soap. This case study — which involved control over the use of racist imagery in relation to soap products — ties in neatly with the conference's themes: it usefully illustrates how these racist marks, for example, evidence control over the construction of identity, thereby exercising power over the group of people referenced in such marks in a way that transcends both time and place. In short, it reveals the lingering deleterious effect that the circulation of these marks has had on referenced groups. The talk concludes by exploring the possible reasons accounting for the dearth of Anglo-Australian jurisprudence surrounding this statutory provision.

**Fady Aoun** teaches and researches in *Intellectual Property, Corporate Law* and *Foundations of Law* at Sydney University. Fady is a PhD candidate in law at Sydney Law School. Fady's thesis explores the law, theory and practice relating to scandalous and offensive trade marks.

## **Abdul Rahman Bin Awang**

### **Development of Islamic Legal History: Preliminary Enquiries**

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As we all aware that Islamic law was emerged in Arabia around 600 C.E. It can be divided into two major phases: during *Meccan* period (609-622CE) and *Medinan* period (622-632 CE). Both phases have their own characteristics and salient features. The *Meccan* period was not so much on law, *per se*, rather on the system of beliefs, ie to believe in the Prophethood, the Day of Judgment, dialog with pagans Arab in and around Arabia etc. As for *Medinan* period, this is the stage where Islamic legal system was really emerged and took shape. It is in this period that God revealed the complete system of Islamic law to govern the individuals and societal need. It deals with all aspects of life. To mention a few, on family, criminal, transaction, constitution, the law of war and peace as well as civil and criminal procedures. Generally speaking, the whole body of law characterized by three main principles: removal of difficulty, reduction of obligations (to do and not to do) and gradual process of legislation. For instance, the prohibition of liquor was revealed in four stages, the same with the prohibition of usury and any other subject. All these principles will be discussed in this paper.

**Dr Abdul Rahman Awang** graduated with LLB. from the Faculty of Shari'ah and Law, and Diploma in Education, University of al-Azhar, Cairo. He then obtained LLM in Comparative Laws from Temple University, USA. Subsequently, he taught Islamic law courses at the Dept of Shari'ah, National University of Malaysia. In July 1983, he joined the International Islamic University of Malaysia. He is among the pioneer lecturers at the said University. He received a PhD in Islamic law from the University of Edinburgh, UK in May 1988. Currently, he is an Associate Professor at the Dept of Islamic law, Ahmad Ibrahim Kulliyah (Faculty) of laws, International Islamic University of Malaysia. He is now actively engaged in research on current issues in Islamic law especially in the areas of Islamic Criminal law, Islamic Banking, Takaful and Finance. Currently, he is appointed as a Director and Chairman of Shari'ah committee, Alliance Islamic Bank Berhad. He is also appointed as a member of Shari'ah committee of AIA AFGTakaful Bhd.

## **Tony Ballantyne**

### **"Waste" and "Improvement": People, Power and Place in Colonial Otago**

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Is it well established that the colonial state's policies towards 'waste lands' were an important element in the erosion of Maori economic and political autonomy during the middle decades of the nineteenth century. This paper suggests that 'waste' was, in fact, a colonial 'keyword' and offers a broader reading of how notions of 'utility' and 'waste' underwrote a complex set of social and political conflicts in colonial Otago. These disputes over land policy were not simply clashes between colonisers and the takata whenua, but rather were a series of political and legal contests over the efficacy of differing forms of social and economic organisation. These conflicts called supposedly authoritative blueprints for colonial development into question, offered widely divergent readings of the European past, and forwarded competing readings of the colonial future. By mapping some of these key fault lines, this paper rematerialises some neglected traditions of popular political economy and explores the interplay between legal institutions, political culture, and the development of colonial economic life.

**Tony Ballantyne** is Head of the Department of History and Art History at the University of Otago and is the Director of the Centre for Research on Colonial Culture at the same institution. He has published widely on the intellectual and cultural history of the British empire during the nineteenth century. Much of his recent research and writing has focused particularly on civic culture and intellectual life in southern New Zealand from the 1830s to 1900.

## Lauren Benton

### Modalities of British Protection in the Early Nineteenth Century World

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Practices and claims about the extension of protection over subjects featured in a wide variety of empires across regions and over several centuries. Colonial conflicts of the early nineteenth century British Empire brought this preexisting discourse of protection into sharp focus, transforming it subtly in the process. Two modalities – one referencing British power against external enemies and another involving claims about British law’s capacity to shelter subjects from internal enemies of order – were closely related in theory and practice. Tracing the connections between “inside” and “outside” protection through an analysis of the legal politics of Ceylon and the Ionian Islands, this lecture seeks to help recover the early nineteenth century imagination of British imperial legal administration as constituting the spine of the global order. Recognizing the salience of discourses of protection also helps illuminate responses to British violence that did not conform neatly to categories of rebellion or proto-nationalism. The legal meanings of protection in this period, finally, compose a missing piece of narratives about the origins of the “right to protect” in current debates about humanitarian intervention.

**Lauren Benton** is Silver Professor and Professor of History, Affiliate Professor of Law, and Dean of the Graduate School of Arts and Science at New York University. Benton’s research focuses on the comparative history of empires and the relation between imperial law and global order. Benton’s books include an edited volume published this year (Lauren Benton and Richard Ross, *Legal Pluralism and Empires, 1500-1850*) and two other books on law and empire: *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (2010); and *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (2002), which was awarded the World History Association Book Award and the James Willard Hurst Book Prize. Benton received her A.B. from Harvard University and her Ph.D. from Johns Hopkins University. She and Lisa Ford are currently co-authoring a book about legal politics in the British Empire in the early nineteenth century.

## **Richard Boast**

### **Tenurial Revolution on the Pacific rim in the 19th century: comparisons and contrasts**

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In the nineteenth century many countries around the Pacific rim set in place new policies which individualised lands held on customary tenure by indigenous towns and communities. This process of change includes countries belonging to both the Civil Law and Common Law traditions. Examples include the Pacific states and territories of the United States, as well as Mexico, Guatemala, El Salvador, Costa Rica, Peru, Chile, Hawaii, the Philippines - and New Zealand. Why did all these diverse countries embark on similar policies at around the same time? In what ways are these jurisdictions similar and dissimilar? What are the common sources of the ideology that underpinned these legal transformations? This paper, while not attempting to fully resolve these complex questions, will begin to address them and will suggest a way forward by which they can be analysed and better understood.

**Richard Boast** is a professor of law at Victoria University. He teaches in the areas of Property law, Maori land law, and legal history. He has appeared in the Waitangi Tribunal as counsel and expert witness on many occasions, and he is currently representing a number of groups in the Rohe Potae (King Country) regional inquiry. His book *Buying the Land, Selling the Land*, was awarded the Montana Book Award for history in 2009, and he has recently published a new book on the Native Land Court from 1862-1887 (2013). In 2012 he received a Marsden grant to work on comparative tenurial change around the Pacific rim in the 19th century.

## Bettina Bradbury

### Caroline Kearney and her husband's final wishes in mid-nineteenth century, Victoria, Australia

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“In the event of my said wife remaining in the colonies. . . all her interest in my will is to cease,” wrote the Irish immigrant, Edward Kearney prior to dying in Melbourne, Victoria, Australia in 1865. Edward’s will instructed his Australian trustees to send his wife, Caroline and their six children to Ireland where he wanted them to live in a house of his Irish trustees’ choosing. Kearney’s will dramatizes the extent of male’s rights under the freedom of willing that was so dear to British colonizers. Within the broader context of the literature on gender, empire, networks etc., this paper seeks to blend legal history, micro-history, and family history to explore the reasons behind Kearney’s wishes, Caroline’s responses, and the court cases that Edward’s wishes generated. In terms of the themes of this conference, “People, Power and Place,” it interrogates the places – colonial South Australia and Victoria in which Edward and Caroline became colonizers, exploring their interactions with indigenous peoples, the challenges of troubles with scabby sheep and the “glittering gold of stations in a waterless country.” It focuses on the people of this family, and on the power of Edward Kearney, his brother William, and of the Judge in the court of Equity, Robert Molesworth with whom Caroline interacted at least four times as she sought to have her husband’s wishes overturned.

**Bettina Bradbury** is a Professor of History and of Gender, Sexuality and Women’s Studies at York University. She is a feminist family historian whose earliest work looked at women and family economies in industrializing Montreal and whose latest publication deals with the laws surrounding marriage and widowhood as well as how women experienced the transition from marriage to widowhood in the nineteenth century colony/province of Quebec. Her latest book, *Wife to Widow. Lives, Laws and Politics in Nineteenth-century Montreal*. (Vancouver: University of British Columbia Press, 2011), was awarded the 2012 Prix Lionel Groulx by the Institut d’histoire de l’Amérique française, and the 2012 Clio Prize by the Canadian Historical Association as well as shortlisted for the Canada Book Prize for the Social Sciences, the Canadian Historical Association’s John A. Macdonald Prize and the CHA Political History Group book prize. Her current major research project explores the laws of marriage, property and inheritance in the 19<sup>th</sup> century Cape Colony, New Zealand, Victoria – Australia and Quebec. Publications related to that project include: “In England a man can do as he likes with his property:” Competing Visions of Marriage and Inheritance in Nineteenth-Century Quebec and the Cape Colony,” in *Within and Without the Nation: Canadian History as Transnational History*, edited by Adele Perry, Karen Dubinsky and Henry Wu, forthcoming, Toronto: University of Toronto Press, 2013; “Troubling inheritances: an illegitimate, Māori daughter contests her father’s will in the New Zealand courts and the Judicial Committee of the Privy Council,” *Australia and New Zealand Legal History E-Journal*, [2012]; “Colonial Comparisons: Rethinking Marriage, Civilization and Nation in 19th century White- Settler Societies,” in Phillip Buckner and G. Frances eds., *Rediscovering the British World*, (Calgary: University of Calgary Press, November, 2005), 135-58, and her earlier “From civil death to separate property: Changes in the legal rights of married women in nineteenth century New Zealand,” *New Zealand Journal of History*, Vol. 29, 1 (April, 1995): 40-66.



## **Rachel Bradshaw**

### **International Patent law: An Imbalance of Competing Interests?**

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Historically, the law has based the philosophical justification of granting intellectual property rights on a utilitarian methodology. This methodology embraces the idea ‘that property rights are necessary as a means to an end – the end being human happiness.’(Becker, 1977) The granting of a patent bestows private property rights in the form of a monopoly for a specified period of time, in return for the disclosure of an invention that benefits society. The pursuit of an appropriate balance between the protection of intellectual property rights and maximum public access has proven to be a difficult objective to achieve. Possibly the most controversial and emotive subject area in patent law is in relation to trying to achieve this balance in the context of pharmaceutical products.

International patent law (through the TRIPS Agreement) endeavours to find a balance between facilitating incentive for future innovation and providing developing nations with access to life-saving pharmaceuticals. However, even with the advent of many new pharmaceutical products in recent times, about one third of the world’s population does not have adequate access to essential medicines for diseases that are preventable or treatable with existing medicines. This presentation will consider the historical rationale behind patent rights to establish whether the exemptions available in the TRIPS Agreement provide the appropriate balance between the competing interests. The creation and evolution of these exemptions will be examined to reach a determination about how effective international patent law has been in promoting ‘human happiness’ for all.

**Rachel Bradshaw** is a lecturer and First Year Coordinator at the School of Law at James Cook University in Townsville, Australia. Rachel has a Bachelor of Laws (Hons) from James Cook University and a Master of Laws Degree from Queensland University of Technology. Recent publications are in the areas of intellectual property law and legal education.

## **Richard Burchill**

### **The Courts of Mixed Commissions in the Eradication of the Slave Trade: A Demonstration in the Successes and Shortcomings of Legal Power in Faraway Place**

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From the early 19<sup>th</sup> century Great Britain led global efforts directed at ending the slave trade. Even though Britain possessed significant naval power allowing it to frustrate the slave trade in the Atlantic, it also made use of international legal instruments as a means of gaining cooperation from other states in the pursuit of a humanitarian objective. Over the course of the 19<sup>th</sup> century these instruments put in place a range of institutions and processes for dealing with suspected slave traders. One of the more innovative institutions was the Courts of Mixed Commissions that sat in various overseas locations from 1819-1871. These Courts represent the first international tribunals created through international treaties for addressing a humanitarian matter. The Mixed Commissions represent a shift in the projection of British power from what is commonly termed hard power arrangements (military strength) to soft power efforts. The Commissions had a significant impact upon the slave trade as they dealt with over 600 vessels engaging in the trade resulting in more than 80,000 slaves being liberated. At the same time the Commissions faced a number of practical and legal obstacles that hindered their ability to bring about the eradication of the slave trade.

This paper examines the workings of the Mixed Commissions focussing on why this particular form of judicial body was developed by Great Britain to address the issue of the slave trade. It will chart the creation and development of the Commissions to demonstrate their effectiveness in addressing the slave trade but also highlighting the limits they faced in exercising actual jurisdiction and authority. The focus will be on the Mixed Commissions in Sierra Leone which were the most active. Attention will be given on the reports produced by the Commissioners and communicated to the British government. These reports provide insights into the impact and limitations of the Mixed Commissions demonstrating the fluid nature that is inherent in the assertion of legal power in faraway places.

**Dr Richard Burchill** is Reader in the Law School and Director of International Partnerships for the Faculty of Arts and Social Sciences, University of Hull. He is also a member of the Wilberforce Institute for the Study of Slavery and Emancipation with his research and teaching interests focusing on issues of democracy and the protection of human rights in the context of global governance with a particular interest in the role of international organisations.

## **Lauren Butterly**

### **People power creating ripples in the sea space: Does Australia need to have a conversation about the foreshore and seabed?**

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The foreshore and seabed debate in Aotearoa is an extraordinary example of people, power and the relationship to place. The Foreshore and Seabed Act 2004 (NZ) was a legislative reaction to the New Zealand Court of Appeal decision of Ngati Apa [2003] 3 NZLR 643. The Ngati Apa decision held that the Māori Land Court did have jurisdiction to consider applications relating to the foreshore. In response, the Foreshore and Seabed Act vested public ownership of the foreshore and seabed in the Crown, extinguished Indigenous title to the foreshore and seabed and introduced a new type of statutory claim. The Act was met with continued criticism and calls for its repeal. Finally, in 2011, the Foreshore and Seabed Act was abolished and replaced with a new legislative regime.

Across the Tasman, Australia has seen native title claims to the foreshore and sea, but seemingly without any significant public debate nor legislative change. Rather, it has been controlled by judicial decisions. The largest sea claim in Australia's history - the Torres Strait Sea Claim - will soon go before the highest court in Australia. Yet, the two lower court cases and the High Court hearing created hardly a ripple in the public sphere.

This paper examines whether the participation of people in the foreshore and seabed debate, the power struggles exposed and the public expression of relationships to place has made for a deeper understanding of Indigenous rights to marine areas in the wider community of Aotearoa compared to Australia. This paper does not seek to suggest that Australia go down the same path which caused such anger and hurt in the Aotearoa community – far from it. Rather, that Australia seek to have a public ‘conversation’ having learnt from the experience of the foreshore and seabed controversy.

**Lauren Butterly** (LLB (Hons)/BA (History) UWA), is a Lecturer in Law at the University of Western Australia (UWA) and a PhD Candidate in Law at the University of New South Wales (UNSW). Lauren researches in the areas of environmental law and Indigenous peoples and the law. Her doctoral studies explore the interaction of these two areas of law in the context of marine environments. She has previously worked as the Principal Associate to the Chief Justice of the Supreme Court of Western Australia and as an environmental lawyer in Sydney. Lauren is a Member of UWA's interdisciplinary Oceans Institute and a Centre Associate of UNSW's Indigenous Law Centre.

## Edward Cavanagh

### **Crowns and Corporations in the Early Modern World: Settler Colonialism, Accountability, and the 'Royal Will'**

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Corporations changed the face of Europe, and they instigated processes of dispossession in almost every settler colonial locale on the planet. In key windows of corporate rule, or periods during which royal government was ambivalent and patchy, companies were often behind the earliest (and most legally onerous) acts of dispossession and acquisition in North America, northern Ireland, southern Africa, and Australasia. And, in their flagrant ignorance of established sovereignties (even in the face of often-concerted indigenous resistance), and in their occasional escape from the jurisdiction of crowns, courts, and parliaments (even amid their constant regulation by statute), these companies made an important transformation from the corporation-as-person-and-royal-mechanism into the increasingly autonomous, jurisdiction flouting, multinational corporation we see know best today: yet still a person, yet still a government, but something more. In law, the corporation was 'the absolute individual', an actor made up of actors, which acted and was acted upon, paraphrasing Laski and Maitland. Born of the state, or rather, as was more common, the monarch's desire, it was an altogether novel kind of subject whose loyalty was not always secured merely by the fact of royal patronage. How tempted may we be to melt the jurisprudence of corporations (which stresses personhood), into a corporate theory of historical agency (which might mobilise privatised actors in global contexts unfamiliarly)? Does the fact of a monarch's being the source of rights and privileges make all corporate actions performed by the 'royal will'? To what extent were early corporations performative of individual will or royal will, and to what extent were they public agents or private agents? How do we make sense of corporations in the global history of settler colonialism between 1590 and 1930? These are the questions I pose in this paper.

**Edward Cavanagh** is a Trillium Foundation Scholar at the University of Ottawa, where he also holds the R. Roy McMurty fellowship for Canadian legal history. He is the co-founding editor of *Settler Colonial Studies*, and his most recent book, *Settler Colonialism and Land Rights in South Africa*, was released in April this year by Palgrave Macmillan.

## Claire Charters

### The Legitimacy of Indigenous Peoples' Norms Under International Law

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I assess Indigenous peoples' norms under international law against a definition of legitimacy that draws on contemporary international relations and international legal scholarship, especially that of Thomas Franck in addition to constructivism, transnational legal process theory and social movement theory. I argue that Indigenous peoples' norms under international law carry legitimacy. As such, they have both the capacity and the potential to pull states into compliance.

First, Indigenous peoples' norms under international law have 'procedural legitimacy.' While the proliferation of international institutions engaged in international law making on Indigenous peoples' norms undermines the transparency and certainty ideal in a law-making process, the international legal system has reflexively countered these legitimacy deficits with institutional cooperation and robust law-making procedures. In addition, this procedural legitimacy is enhanced by Indigenous peoples' participation in international law-making as it realises their just claims to self-determination and to deliberative law-making.

Likewise, Indigenous peoples' norms under international law have 'substance legitimacy': international law is ultimately fairer as a result of the content of these norms. Indeterminacy and incoherence caused by the fragmentation of international Indigenous peoples' norms, which can be legitimacy negative, have been mitigated by dialogue between institutions making and applying Indigenous peoples' norms. Dialogic interactions minimise conflict between, and inconsistent articulations of, Indigenous peoples' norms sourced in different international instruments, as well as the broader incoherence in the principles undergirding them, restoring some clarity to the law.

Finally, state engagement with norms in international and domestic fora, often propelled by non-state actor initiatives, leads them over time to internalise international norms, which is increasingly the result of states' interaction with Indigenous peoples' rights under international law. In becoming internalised, what I term the 'engagement legitimacy' of international norms is enhanced.

**Dr Claire Charters**, Ngati Whakaue, Nga Puhi, Tuwharetoa and Tainui, is a senior lecturer at the School of Law, University of Auckland. Claire teaches and publishes on the rights of indigenous peoples under constitutional and international law. Claire has also advocated for indigenous peoples in international fora and worked in the Indigenous Peoples and Minorities Section of the United Nations Office of the High Commissioner for Human Rights from 2010 - 2013.

## **Libby Connors**

### **Uncovering the shameful: sexual violence on an Australian colonial frontier**

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While Australian historians have long acknowledged sexual assault by white frontiersmen as a causal factor in Aboriginal reprisals, precise information has been limited. Historians have had to elaborate from local rumours and oral history to explain what would otherwise be construed as unprovoked aggression. This paper discusses some proven incidents of interracial sexual assault on the Moreton Bay frontier in the 1840s and investigates how these assaults and other examples of white aggression were either ignored or cloaked in the letters and memoirs of leading settlers of the district. The crafting of settler stories for female family members was not always a sufficient shield from the violence of dispossession and the responses of two women from a leading settler family to this otherwise hidden violence is also considered as part of this history of hidden violence.

**Dr Libby Connors** is senior lecturer in history at the University of Southern Queensland. She is a co-author of three books and numerous articles on Queensland history. Her current research interests focus on Indigenous law and politics in Queensland in the early colonial period. She is a regular contributor to Law and History conferences and is currently ANZLHS vice-president.

## Chris Davies

### Conquered, Ceded or Settled?: The Legal History of Customary Land Title in Australia and Wales

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Traditionally there were three methods as to how land was acquired by imperial powers, namely conquered, ceded or settled. Up until the High Court of Australia's decision in *Mabo v Queensland* (1992) 175 CLR 1, the enlarged notion of terra nullius had been applied to Australia on the grounds that, as it was practically unoccupied with no land under cultivation, it could be considered as a settled country with no recognition of the customary law. In *Mabo*, however, this enlarged notion of terra nullius was overturned and, from a legal perspective, Australia was considered to be the equivalent of a conquered country. This then meant that customary laws survived until overruled by laws from the 'conquering' country. In Wales, meanwhile, the country had been conquered by England in 1285, though it was not until the sixteenth century that English law was made to apply to Wales. However, special exceptions were made in regard to three counties in North Wales, and as a consequence there is a legal argument that some customary land law may still survive.

**Dr Chris Davies** is an Associate Professor at the School of Law, James Cook University. His main research areas are Sports Law and Cultural Heritage and Property Rights. He has many journal publications in both areas, is a co-author of Sports Law and the author of Property Law Guidebook Series.

## Chris Dent

### ***Nordenfelt* and other 19<sup>th</sup> Century Restraint of Trade Decisions: Controlling People and their Places of Work**

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Restraint of trade clauses restrict a person from working in a given area for a particular period of time. Most commentators see the House of Lords decision in *Nordenfelt v Maxim-Nordenfelt* [1894] AC 535 as the beginning of the modern era of the doctrine. A more nuanced reading of the judgments – that is, one that looks past the oft-repeated phrases of Lord Macnaghten – suggests that *Nordenfelt* is very much a decision of the nineteenth century. The aspects of *Nordenfelt* that effectively site it in that period include the conception of reasonableness used, the utilitarian reading of the role of knowledge, the assessments of the interests of both the parties concerned and of the wider public, and the understanding of the function of contracts, simplistically viewed as *laissez-faire*, that is implicit in it. Further, it is likely that the appellant's status as a foreigner, along with the potential for (more) international conflict involving England, also impacted on the Law Lords. In short, it seems odd that a covenant that prevented an inventive individual from exercising his trade anywhere in the world for the rest of his working life could be the basis of a modern decision. It is only through a careful reading of it, and its antecedents, that a more complete picture of it may be found.

**Chris Dent** is a Principal Research Fellow with the Intellectual Property Research Institute of Australia and has been employed at the Melbourne Law School since 2003. This paper stems from an ARC Discovery project into the control of worker-generated innovation which has a particular focus on restraint of trade and confidentiality clauses in employment contracts. More broadly, while most of my work has to focus on the current operations of the intellectual property system, I have published articles on 19<sup>th</sup> century defamation law and on the early modern patent system. Further, my PhD was an archaeology of English negligence decisions from 1750-1972.



## **Heather Devere and Michael Ligaliga**

### **COVENANT OR CONTRACT: THE TREATY OF FRIENDSHIP BETWEEN NEW ZEALAND AND SAMOA 1962.**

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This paper looks at different interpretations of the 1962 Treaty of Friendship between New Zealand and Samoa, to uncover possible sources of misunderstanding between the two nation states.

The 1962 Treaty of Friendship marked the independence of Samoa from New Zealand. Unlike most international treaties of friendship, the NZ/Samoan treaty was written in languages of both of the signatories, with both languages, English and Samoan, designated as 'equally authentic'. In addition, the wording of this treaty differed from most international friendship treaties in that the language of human rights and egalitarianism was used, rather than previous terminology associated with the Treaty of Westphalia.

However, a comparative linguistic analysis reveals that, while the English version uses the language of contract and human rights, the Samoan version uses the language of Christianity and spirituality. We argue that this difference in language may explain some of the differences in importance accorded to the Treaty in New Zealand and Samoa.

**Dr. Heather Devere** is Director of Practice at the National Centre for Peace and Conflict Studies at the University of Otago, Dunedin where she teaches conflict resolution and the peace traditions of Aotearoa. She supervises a number of Masters and PhD students. Heather's academic background is in political science with a PhD from the University of Auckland in political behaviour and attitudes. Her research focuses on topics with relevance for peace and conflict such as the politics of friendship, peace journalism, women and politics, and refugee rights.

**Pualele Michael Fusi Ligaliga** is teaching conflict resolution and peace building at Brigham Young University in Hawaii where he obtained his undergraduate degree in Political Science and Peace Building. His Master's thesis from the University of Otago is a Samoan Perspective on the 1962 Treaty of Friendship between New Zealand and Samoa. Michael is also researching indigenous models of conflict resolution

## **Matiu Dickson**

### **Kei runga te korero, kei raro te rahurahu (Talk is cheap)**

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My appointment in 2010 as one of three Negotiators for the Treaty Claim of my iwi of Ngaiterangi, Tauranga Moana, was a dream come true for me, because in my mind it gave me an opportunity to contribute directly to the future prosperity of the tribe. However, the experience was less than satisfactory for me. Even though we all understood that any reparations would never ever equal in value the huge loss of our lands, it was frustrating and disingenuous to hear the Crown negotiators quibble about the finer points of property ownership and transfer. It seemed that the enormity of the land loss, economic deprivation and cultural genocide for our tribe was being lost in the conversation between the parties. So how fair can this process be? This paper discusses this question and poses some solutions.

**Matiu Dickson** is a senior lecturer-in-law at Te Piringa Faculty of Law, the University of Waikato. He teaches the kaupapa Maori content of some of the law papers in years 1 and 2 of the LLB. He is an expert in tikanga Maori and traditional Maori song and judges at Te Matatini. His tribe is Ngāiterangi of Tauranga. The tribal pepeha is: Ko Mauao te Maunga, Ko Tauranga to Moana, Ko Mataatua te Waka.

## Shaunnagh Dorsett

### Māori and the Civil Jurisdiction of the Resident Magistrates Court 1846-1852

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In settler colonies investigations of the relations between indigenous populations and settler law tend to focus on the circumstances in which those indigenous peoples were found amenable to the jurisdiction of British law – in other words when they were subjected to law – and in particular to the criminal law. By contrast, this study focuses on the use of the civil jurisdiction of the Resident Magistrates Courts by Māori plaintiffs in the period 1846-1852. Initial data from court returns shows that Māori were using the courts, primarily to enforce unpaid wages and debts for unpaid goods, in much higher numbers than could have been predicted, particularly given that the courts were imposed by the settler legal system. However, not only is this a surprising level of engagement with British courts, it also suggests a very high level of involvement in the economic and commercial fabric of the colony, a mere six years after the signing of the Treaty of Waitangi.

This paper presents the new data for two purposes. First, it simply shows an unexpected and proactive scale of Māori engagement with the lower level courts - and engagement with the civil law in particular - which it is suggested has not yet been observed elsewhere in settler colonies. Second, such an engagement complicates the picture of sovereignty in the new colony. While the Treaty of Waitangi may have formally ‘transferred’ sovereignty, that process of sovereign acquisition of course took place over a much longer timescale, in a series of micro politico-legal encounters. So far, the story has, as mentioned above, concentrated on the taking of sovereignty via criminal law. But this data tells a more complicated story – of Māori both using and resisting British law in the 1840s.

**Shaunnagh Dorsett** is Professor of Law in the Faculty of Law, University of Technology, Sydney, where she leads the Faculty’s research strength in legal history, and President of the ANZLHS. Her research is primarily on sovereignty and jurisdiction (both as historical investigation and as jurisprudential concern). Her most recent book is Dorsett, McVeigh *Jurisdiction*, Routledge 2012. Her current research project, funded by a New Zealand Law Foundation Grant, is Māori before the British Courts: New Zealand 1835-1852.

## Alvina Edwards

### Counting Indigeneity; Blood Quantum Ideology in Australia, Canada and New Zealand

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The study of blood quantum has become an important aspect of the preservation of many Indigenous Peoples. From a historical and cultural perspective, blood quantum standards divide and alienate communities and perpetuate a discourse that promotes internalised self-hatred, alienation, and fractionation. This thesis is a comparative study which will investigate and expand on existing legal research on Indigenous Peoples in Australia, Canada and New Zealand. All are communities that have been subjected to the ethical, legal and social impacts of the half-blood; half identifiable; half legitimate, half human theories.

As the theory of blood quantum continues to disaffect many Indigenous Peoples, it is crucial to strengthen Indigenous communities against the modern eugenics discourse which is the use of biological testing [DNA analysis test for certain genetic markers] which claims to measure who is 'truly Indigenous'. Not all but most Indigenous Peoples in this study either hold letters of tribal enrolment or enrolment cards that prove their indigeneity. This research will develop new tools to prevent Indigenous Peoples from being trapped within these social constructions, in fact most Indigenous Peoples are setting their own blood quantum limits for recognition, but these requirements were initially determined by their coloniser's.

Moreover, this thesis will explore possible preservation techniques; changing the narrative of identity; creating a journey of recovery through narrative knowledge management; to elicit and disseminate knowledge, encourage collaboration, and generate new ideas to ignite change that may protect Indigenous Peoples from the inexorable use of this concept. Ultimately, Indigenous Australian, Canadian and Maori Peoples need to be the ones in control of their identity; tribal affiliation; cultural continuity; destiny and the manner in which they are defined legally.

**Alvina Edwards** is from Te Wai Pounamu and spent her early life in growing up Wallacetown and Christchurch. She has lived in the Waikato for 18 years with her four beautiful children. Her Iwi affiliations are Ngai Tahu, [Ngati Irakehu] Horomaka and Ngāti Kahungunu, [Ngati Pahauwera], Mohaka. With her educational journey she has completed a Bachelor of Laws [LLB]; Bachelor of Arts [BA] in History & Maori Cultural studies / Tikanga Maori- 2011; Masters of Laws [LLM] with First Class Honours- 2012. She has also completed her Professional Legal Studies in 2012. She is a confirmed PhD candidate at Te Piringa Faculty of Law. Her principal interests have been in the protesting against injustice, politics both local and central and she is currently interested in the impact and effects of Blood quantum.

# Tristan Egarr

## Alexander Herdman as Attorney General

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Alexander Herdman was New Zealand's Attorney General and Minister of Justice during the first years of the Massey Government and the First World War. He oversaw the police response to industrial conflict during 1912-3, and introduced emergency war legislation giving the government significant new powers, including radical changes to the law of evidence. At the beginning of 1918, he resigned from cabinet to become a Judge of the Supreme Court; even political allies objected that he had essentially appointed himself, and that he did not have the necessary experience or legal knowledge to hold such a position. He was also responsible for the Public Service Act which defined much of the state sector for over half a century.

Herdman has attracted little attention from historians, and in this paper I will argue that he was a more significant figure than accounts of the 1910s acknowledge: he encouraged his Prime Minister to take a more heavy-handed approach to militant unions and anti-militarists than other members of the Reform and Coalition cabinets advocated. I will argue that his attitude towards the ideal function of the state resulted in significant legal innovations, and that he played a pivotal role in the determining the direction and form of the growth of the New Zealand government.

**Tristan Egarr** is a PhD student in History at Victoria University of Wellington. His research interests include the growth of the state and relationship between the military and the justice system in late nineteenth and early twentieth century New Zealand.

## Jeremy Finn

### Lawyers, ‘place’ and power

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This paper looks at the early New Zealand legal profession and questions whether “place” – in the nineteenth century sense of a governmental position or appointment which carried with it a salary or fees - was a key component in the professional success of individual lawyers in the fledgling colony and, more broadly, whether the legal profession generally was reliant to a significant degree on the ability to draw on the public purse. The research on which it is based forms part of a larger project on early New Zealand lawyers, in which it has become evident that a significant number of the first cohort of lawyers held, at one time or another, some form of political, judicial or administrative office which brought the holders some significant income. The paper will sketch out that data, and then look to data from later years – particularly from the 1870s, where the record for both central and provincial government is both accessible and reasonably complete. The analysis will include both salaried positions and those, such as crown prosecutors or revising barristers, which depended on fees. It will further consider the extent of multiple office-holding, the stage in lawyers’ careers where appointments were made and what matters may have influenced appointments. I will conclude by considering some of the implications of this analysis for our received views of the legal profession as operating largely independently of the state.

**Jeremy Finn** is a Professor of Law at the University of Canterbury. He has a strong interest in New Zealand legal history and, more widely, the legal history of the British Empire and colonial history. His publications in this field include *Educating for the Profession: Law at Canterbury 1873-1973* (2010) and (with Peter Spiller and Richard Boast) *A New Zealand Legal History*, as well as more than 20 book chapters and articles on topics as diverse as legal change in the Irish Free State and the workings of the Resident Magistrates’ Courts in early Canterbury. He is currently engaged on a study of the early New Zealand legal profession.

He also researches and teaches in the fields of criminal law, criminal justice, contract law, intellectual property law and the NZ Bill of Rights Act, and has published in all those fields.

## Georgina Fitzpatrick

### **Pushing Baby Out: war crimes trials and an episode in Anglo-Australian relations, 1947-8**

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Australia and Britain, as did other Allies, held several series of war crimes trials in the aftermath of the Second World War. In Singapore, where the Australian and British trials coincided, there was amicable co-operation. In return for some division of labour over the subject matter of the trials, the British provided accommodation, administrative resources and other necessities. When the first Australian War Crimes Section moved to Hong Kong, the expectation that similar co-operation would ensue was dashed. This paper charts the growing resentment of the Hong Kong authorities about Australian expectations, the experiences of those attempting to conduct 13 trials there and the consequences for the Australian war crimes trials' program. The year spent in Hong Kong can be seen as a not particularly happy episode in Anglo-Australian relations and perhaps is a marker in the shifting alliances of the post-war world when Australia could no longer rely upon common British ties but must turn more towards the American alliance, or even stand upon its own feet. (181 words)

**Dr Georgina Fitzpatrick** is a Research Fellow at the Asia Pacific Centre for Military Law, Melbourne Law School. In 2009, she was appointed as the historical researcher on an ARC Linkage grant, *Australia's Post-World War II Crimes Trials of the Japanese: A Systematic and Comprehensive Law Reports Series*, a joint project of the Asia Pacific Centre for Military Law, the Australian War Memorial and Defence Legal. The main publication emerging from this project will consist of Law Reports prepared by Dr Narrelle Morris (APCML) of all 300 trials with contextual essays on the eight locations of the trials authored by Dr Fitzpatrick. Among her publications is a chapter, 'War Crimes Trials, "Victor's Justice" and Australian Military Justice in the Aftermath of the Second World War' in Gerry Simpson and Kevin J. Heller eds, *Hidden Histories of War Crimes Trials*, Oxford University Press, 2012 (forthcoming). A further volume of essays on legal and historical issues will be published by Martinus Nijhoff in 2013. Dr Fitzpatrick received her doctorate in 2009 for her thesis, undertaken at the Australian National University, entitled 'Britishers Behind Barbed Wire: Internment in Australia during the Second World War'.

**Lisa Ford**

**Commissioning Global Order: Commissions of Enquiry and the Reconstitution of the British Empire, 1800-1840**

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Commissions of Inquiry are one of the most neglected phenomena in the early nineteenth-century British Empire. Yet, between 1802 and 1840, 7 Commissions of General Inquiry, 18 Commissions of Legal Inquiry and 18 Commissions of Inquiry into Captured Negroes were conducted in colonies around the British Empire. They produced hundreds of thousands of pages of testimony. These are fraught and deeply compromised sources, but, read together, they provide unparalleled comparative datasets on the interface among metropolitan projects of reform, colonial legal institutions and the everyday mechanics of colonial governance. Commissions, in short, are vital sources for imperial legal history requiring sustained and collaborative research.

This paper scratches the surface of their significance to imperial legal history. Zoe Laidlaw has written recently about the tight links between antislavery and the early nineteenth-century commissions. This paper focuses instead on a connected, but arguably more important, function of Commissions of Inquiry in this period - reimagining the British Empire as a global, plural legal order governed by a resurgent Imperial Crown.

**Lisa Ford** is a Senior Lecturer in the School of History and Philosophy at the University of New South Wales and author of the prize-winning *Settler Sovereignty* (Harvard 2010). She is currently working on two ARC projects about British imperial jurisdiction in the nineteenth century. This paper stems from a collaboration between Lisa Ford and Lauren Benton on imperial and international law.



## **Timothy Gassin**

### **Nationhood, Empire, and Dominion status: Exchanges of thought and experience between Canada and Australia in the years preceding Federation**

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The stories of Australian Federation and the growth in national autonomy that surrounded it are usually told in a vacuum. Achievements are presented as wholly the result of Australian initiative and effort, often in opposition to reluctant British authorities. What is often forgotten is that Australia was part of a much larger Empire in which there was theoretically, at least, a legal unity. A concession of greater power to one colony or a judgment of the Privy Council could have ramifications that reached throughout the Empire. This is particularly relevant to the Empire's two most significant areas of settlement, Canada and the Australasian colonies. In the decade or so prior to Federation, leading political and legal figures and constitutional scholars on both sides of the Pacific kept well-abreast of each other's development. Some remained in regular correspondence and many more were involved in occasional exchanges of thoughts and information. Interest in the other country's laws and legal status covered a wide variety of topics, covering both practical matters and more abstract questions of autonomy and Imperial relations. Included in this latter category were their rights to limit Privy Council appeals, to exercise the prerogative powers of honour and mercy, to engage in relations with foreign powers, and the rights of colonies to make agreements with each other in matters of trade. This paper will examine the significance of these exchange of knowledge and thought on conceptions of a federated Australia's place within the Empire and the development of Dominion status.

**Timothy Gassin** is a PhD candidate at the University of Melbourne. He is currently researching the influence of the achievement of Canadian Confederation and Canadian political ideas on the Australian Federation movement.

## Nadia Gush

### **‘Fraternal Fracture and the Court of Law: New Zealand’s 1954 Parker-Hulme Trial’**

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In New Zealand in 1954 two teenage girls, Pauline Parker and Juliet Hulme, conspired to commit matricide. The trial that followed positioned the accused as Derrida’s epitome of friendship. As such Parker and Hulme became the spectre of a teenage fraternity fracturing the normative polis, a spectre to be managed discursively within the courtroom. Drawing on Derrida’s *Politics of Friendship*, this article contends that the court of law was integral to the management of the threat posed by adolescent fraternity to the normative polis at this time. Discursive strategies of speech, isolation, age, and gender worked to dissolve the teenage fraternity that Parker and Hulme presented.

**Dr Nadia Gush** has taught New Zealand history at both Waikato University and the University of Auckland. She is currently interested in exploring the histories of emotions in New Zealand, with recent research exploring love and late nineteenth-century feminism, as well as the politics of mid-century friendships.

## Mark Hickford

### Reflecting on New Zealand's historical, political constitution, the conundrum of 'liberal institutions' in empire, and some legal histories, 1850-1860

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In this paper, I offer some reflections on legal histories concerning empire and colonial New Zealand through the frame of what I refer to as 'historical, political constitutionalism', a heuristic device assisting broad analysis as much as a historically mindful characterisation of the inherent contingencies and indeterminacy of core aspects of the imperial inheritances suffusing early constitutional orders in settlements such as New Zealand, southern Africa and Australia. Britain's empire was a place of and for experiments in constitutional design. In the mid-nineteenth century New Zealand was seen as a striking place and not simply because it was a theatre for war or the threat of warring, as Ceylon and the Cape of Good Hope were seen too, but also a space for contemplating constitutions and their architecture, as in Australia and southern Africa. As I have discussed elsewhere, these experiments in New Zealand occurred against the frame of a political constitutionalism informed not only by diverse imperial sources and ways of seeing but also by the fact that the presence of a treaty and native title made these questions on-going subjects of deliberation across a range of actors. Against this broad background, I will focus principally on the intellectual histories underlying what became the New Zealand Constitution Act 1852, and the constitutional frame's relationship with territorial space as well as the Treaty of Waitangi albeit with a view to also illuminating the need to better historicise indigenous conceptions of constitutionalism – the location and distribution of politically meaningful or influential authority. Policy-makers and others grappled with the challenges posed by the multiple political autonomies of hapū and petty colonial bridgehead settlements. Promising, suggestive legal-historical work has commenced in this arena, some within the past two years. Yet it still very much legalistic in its orientation or narrowly circumscribed in its source-range and requires further emancipation from a number of the narrative and analytical snares posed by the assumptions of introduced conceptions such as 'sovereignty' or 'jurisdiction' – each of which needs to be problematised in order to avoid the so-called 'ventriloquism of forms' when dealing with indigenous actors.

**Dr Mark Hickford** has authored the book *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford and New York, 2011), and has authored chapters and articles on the questions of indigenous property rights and the history of law and political thought, including contributions to the *Journal of Imperial and Commonwealth History* and the *History of Political Thought*. He earned his doctorate from the University of Oxford in the United Kingdom. He was the 2008 New Zealand Law Foundation International Research Fellow, and since 2010 has been in the Prime Minister's Advisory Group at the Department of the Prime Minister and Cabinet in New Zealand. He is presently on secondment to the Ministry for Primary Industries as the Chief Legal Advisor and Director of the Legal Services Directorate, where he leads a group of some 45 lawyers.

## **Chief Judge Wilson Isaac**

### **Exploring the past, present and future of New Zealand's two unique legal institutions: the Maori Land Court and the Waitangi Tribunal**

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This paper will discuss the history, present and future roles of the Native Land Court, Maori Land Court and the Waitangi Tribunal. The aim of this paper will be to clearly show the Maori Land Court and Waitangi Tribunal place in New Zealand's society and the various factors that have influenced that position and role.

**Chief Judge Wilson Isaac** is the Chief Judge of the Māori Land Court and Chairperson of the Waitangi Tribunal. He also sits as a Judge of the High Court of Niue and the High Court of the Cook Islands.

Chief Judge Isaac was appointed to the Māori Land Court in 1994. In 1999, he was appointed as Deputy Chief Judge of the Court and in 2009, he was appointed as Chief Judge of the Court and Chairperson of the Waitangi Tribunal. As a Waitangi Tribunal Presiding Officer, Judge Isaac has presided over the Mohaka ki Ahuriri, Northern South Island and National Park district inquiries and the Napier Hospital Inquiry. He is currently presiding over the National Fresh Water and Geothermal Resources inquiry.

## Marium Jabyn

### “Hobbled by chains”: A critical examination of women’s equality in the Maldives

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In 1965, defending the position of affirmative action, President Lyndon B. argued that there is no fair supports a view that people who are differently positioned, needs differential treatment. This paper explores whether “positive discrimination” can be an alternative approach to gender equality in the Maldives, where women are claimed to be the most emancipated in comparison to the south Asian world. In truth, women’s rights are understudied and undervalued in this small South Asian Muslim nation. Membership to international human rights instruments over the past few decades has prompted constitutional and other legislative provisions on the equality of men and women. However, women are seen as “lesser” and “lower” than men still even today. Moreover, human rights indicators reveal that women’s rights are at the “lowest” in the history of the country. Existing history provides no indication that women’s rights ever received the attention and support it needed to achieve gender equality neither within the private nor the public sphere. Focusing on competing views of why “positive discrimination”, this paper offers an empirical examination of the effect of formal equality on the enjoyment of equal rights by women in the Maldives. It analyses formal equality to determine whether affirmative action (positive discrimination) has the potential to further “equal opportunity” and avert existing barriers for women’s equality. Moreover, will it encourage and empower women to access traditionally male-dominated spheres of life.

**Marium Jabyn** is currently a PhD candidate at Te Piringa – Faculty of Law at the University of Waikato, New Zealand. Her research assesses the impact of the *Convention on Elimination of All Forms of Discrimination against Women* on women’s public lives in the Maldives. Prior to her commonwealth scholarship that brought her to New Zealand, Jabyn has been a Fulbright scholar at the University of Pennsylvania where she attained her LL.M with a concentration in International Human Rights Law. Her background in law and human rights has led her to develop the first Common Core document for the Maldives and the first National Human Rights Action Plan in 2007. Jabyn was the Permanent Secretary at the Attorney General’s Office from 2009 Dec - 2012 Feb - responsible for the recruiting staff at all levels, formulation and implementation of policies for the Attorney General’s Office. Jabyn has served on multiple government boards and was involved with policy making and implementation at many levels. Amongst the most noteworthy of her work includes creating a cadre of legal professional personnel within the civil services for the first time and the implementation of Performance Appraisal system within the Attorney General’s Office. She also served as Chairperson of the Legal Subcommittee of the Civil Services Commission providing legal advice on all policies of the Commission.

## Naomi Johnstone

### **Messy, Necessary and Possible: Engaging with Legal Pluralism and Customary Law to Strengthen Access to Justice**

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Most developing countries have a complex history of legal pluralism where colonisation has added multiple legal systems to the existing customary legal systems. Customary legal systems and the operation of legal pluralism significantly govern the degree to which women and other marginalized groups have access to justice, societal inclusion and human rights protection. A variety of development actors, such as NGOs, the United Nations and the World Bank, have been involved in the state-building processes and continued justice development of former colonised societies. However, despite the primacy of customary systems for many people, the dominant trend has been to invest almost exclusively in formal, state institutions. This approach has often yielded unimpressive results. At the same time, newly independent or autonomous governments have dealt with the situation in a variety of ways, from prohibiting the operation of customary law, to elevating it within in a Constitution.

This paper draws on the author's empirical research in Bougainville, as well as other similar studies internationally, to argue that both international actors and governments must, at the very least, consider engaging with customary law and acknowledging legal pluralism. It acknowledges that doing so is messy, but argues that in order to strengthen access to justice and human rights protection engagement is necessary. Finally, the paper looks at examples such as Bougainville, a newly autonomous region of Papua New Guinea, to show that it is possible to further access to justice in challenging and complex situations.

**Naomi Johnstone** is a scholar-practitioner in the fields of access to justice, rule of law, indigenous rights and conflict resolution. She has experience with the UN in Aceh (Indonesia) and International Crisis Group in Sri Lanka and was the recipient of research grants from International Development Law Organisation (IDLO) and International IDEA in relation to Bougainville (Papua New Guinea). In her home New Zealand, she has worked at the National Peace and Conflict Studies Centre and clerked for the Chief Judge of the Waitangi Tribunal and Māori Land Court. She holds an LLB (hons) and BA from the University of Otago and is currently a PhD candidate.

**Carwyn Jones**

**The Settlement of Historical Treaty Claims: Reconciling Māori and State Legal Traditions**

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The relationship between Māori and state legal traditions informs understandings of people, power and place in Aotearoa. This paper examines the way in which the Treaty settlement process affects that relationship.

Engagement in the Treaty settlement process has significant effects on those Māori communities involved, including effects on the operation of Māori legal traditions - Māori law-making, dispute resolution processes, and areas of substantive law such as membership rules. Underlying the settlement process is a fundamental objective of reconciliation. But are the effects that the settlement process has on Māori legal traditions contributing to, or instead undermining that objective of reconciliation?

This paper locates the specific issues of Aotearoa in the context of an international discourse relating to reconciliation. In particular, James Tully's articulation of the foundations of legitimate and effective reconciliation between Indigenous and settler communities is examined. This is overlaid with Indigenous perspectives on reconciliation and particularly Māori reconciliation concepts and processes. Ultimately, I suggest that the effects that settlement process has on the relationship between Māori and state legal traditions are problematic for the objective of reconciliation.

**Carwyn Jones** is of Ngāti Kahungunu and Te Aitanga-a-Māhaki descent. He is a lecturer at the Faculty of Law, Victoria University of Wellington and his primary research interests relate to the Treaty of Waitangi and indigenous legal traditions. He recently completed a PhD at the University of Victoria, British Columbia. His dissertation is entitled 'The Treaty of Waitangi Settlement Process in Māori Legal History'. Carwyn is the Co-Editor of the Māori Law Review.

## **Tanya Josev**

### **The Culture Wars, the History Wars, and 'Judicial Activism' in Australia 1980-2004**

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Although the term 'judicial activism' was coined in 1947 in the United States to describe a supposedly discernible judicial 'method' exhibited by certain Supreme Court justices, the term remained almost completely dormant in Australia until the 1990s. From the 1990s onwards, however, the High Court of Australia was hurled with derogatory epithets under the umbrella of 'judicial activism' from both sitting politicians and the media. This paper examines the circumstances surrounding the emergence of the 'debate' over legitimacy of judicial activism, drawing out the links between this debate and the concurrent 'History Wars' and 'Culture Wars' that played out in the Australian political and academic arenas in the 1990s.

**Tanya Josev** is a lecturer in the Melbourne Law School, and is completing a PhD in law and political history on the public debate over 'judicial activism' in Australia. She previously worked as a corporate litigation lawyer and as an associate to Justice Goldberg of the Federal Court of Australia. In 2011, she spent a year as a Hauser Global Fellow at New York University Law School conducting research on the American origins of the judicial activism debate.



## Amanda Kaladelfos

### **Homicide in Australia: Analysing the Prosecution of Interpersonal Killing, 1901-1950**

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Based on an analysis of hundreds of historical homicide trials drawn from four contrasting jurisdictions, this paper traces long-term trends in the prosecution of unlawful killing in Australia in the first half of the twentieth century. First, this paper unpacks the historical context of changing patterns in interpersonal violence by analysing the significance of a range of social and criminological factors – such as region, gender, race, age, socio-economic status, and use of weapon – across decades of significant historical and legal change. Second, it analyses how changing prosecution practices – including the professionalisation of legal advocacy, the rising influence of forensic and expert evidence, and new policing methods – influenced the state's treatment of homicide. Overall, this paper suggests a number of underappreciated long-term trends in the committal and response to interpersonal violence in Australia.

**Dr Amanda Kaladelfos** is the Arts, Education and Law Postdoctoral Research Fellow at the Australian Research Council's Centre of Excellence in Policing and Security (CEPS) at Griffith University in Brisbane, Australia. Amanda has published on the history of violence, sexuality, and criminal justice in Australia, the latest articles of which appear in *Women's History Review* and *History Australia*. Amanda is currently working on two projects: the history of homicide in Australia and, with Lisa Featherstone, the treatment of sex crimes in the 1950s.

## **Robert Kipp**

### **The reality of disaster recovery legislation**

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Disasters are a social phenomenon and often attach meaning to a certain time and place, but if the frequency and impacts are to be minimized they are best understood as a culmination of events, as critical markers on a continuum. The history of disaster related legislation in New Zealand began much the same way as other countries in the mid-20<sup>th</sup> century with the aim to defend civilian populations from foreign attacks and civil disturbances, including those triggered by natural hazards. An extended transition period for civil defence and emergency management (CDEM) began in the 1980's and culminated with the Civil Defence and Emergency Management Act 2002 (the Act). No longer based on militaristic structures and values the new legislation was based on sustainable development principles and was well regarded by international disaster scholars – the recovery framework in particular was considered an exemplary model for the US after Hurricane Katrina in 2005. However, after the Canterbury earthquakes additional legislation was created to help bridge the gap between the needs of the immediate and long-term recovery and the plans made under the Act. The purpose of this paper is to share key historical developments of CDEM in New Zealand and to explore the meaning of events in this country to disaster law and scholarship in a wider context. The response and recovery from the Canterbury earthquakes of 2010 and 2011 will form the basis for a critical case study of legislation for disaster recovery.

**Robert Kipp** is currently a PhD student in the School of Law at the University of Canterbury. His research area is disaster governance and recovery legislation, specifically looking at the legislative response for disaster recovery prior to and following the Canterbury earthquakes of 2010 and 2011. Previously he worked as a policy researcher at an environmental policy research institute in Japan, and completed a Master's degree at Ritsumeikan Asia Pacific University where he researched community recovery in Thailand after the 2004 Indian Ocean tsunami.

## Craig Evan Klafter

### Location Isn't Always Everything: The Declining Rights of the Sac and Fox Tribe of the Mississippi in Iowa

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Much of modern American Indian legal history focuses on a minority of cases that have expanded Indian rights.\* However, the majority of American Indian law cases tell a different story – of continuing infringements by the federal and state governments on the rights of American Indians. This paper will trace the legal history of the Sac and Fox Tribe of the Mississippi in Iowa from its privileged status in the mid-nineteenth century when the Iowa legislature passed unprecedented laws to thwart the US government's efforts to relocate the tribe to Kansas, through its unsuccessful attempts through state and federal courts to retain its privileged status, and ultimately to the loss of that privileged status. Although some legal cases suggest hope for the future of American Indian law, this paper will show that there is still a long way to go.

[\*See, for example, Christian W. McMillen, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory* (New Haven: Yale University Press, 2007); Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (New York: W. W. Norton & Company, 2005) and Sydney Haring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (New York: Cambridge University Press, 1994).

**Note:** this paper is being presented as part of the ALHS panel entitled Power, Place, and Presence in Anglo-American Legal Landscapes with Associate Professor Joshua C. Tate and Associate Professor Craig Evan Klafter and Professor Christopher Tomlins. The panel abstract reads: In the past fifty years, legal history has become the most heavily populated “theory and perspective” subject in the contemporary American law school. That growth has been accompanied, inevitably, by immense and increasing diversity. Legal history's traditional roots in English medieval and common law history have been supplemented by waves of interest in distinctively American subjects, and, somewhat more recently, by a proliferation of methodological, theoretical and interpretive perspectives. This panel will present three distinct but related examples of how legal history is currently being pursued in North America, each attentive to one or more aspects – power, place, and presence – of the Dunedin Conference theme. Joshua Tate will present a paper that speaks to the continuing vitality of medieval and early common law history in the American legal academy, and that simultaneously demonstrates how that tradition can illuminate endlessly interesting questions of power and jurisdiction. Through a case study exploration of American Indian law, Craig Evan Klafter will demonstrate how the expansion of American legal history has seen the field opened to subject areas more or less completely ignored half a century ago. Finally, Christopher Tomlins will offer a paper that reflects upon slave rebellion as a subject for legal history and upon the role of literary texts in furnishing interpretive perspective for historical inquiry.

**Craig Evan Klafter** is Associate Professor of History and Associate Provost for International Programs, University of Northern Iowa. He holds B.A. and M.A. degrees from the University of Chicago, and a D.Phil. in Modern History from the University of Oxford. He has held faculty positions at the University of Manchester, the University of Southampton, Boston University, and the University of British Columbia. He has also served as Associate Historian at the Federal Judicial Center in Washington, D.C., Assistant to the Provost and Assistant to the President at Boston University, Associate Vice-President International at The University of British Columbia; and Pro Vice-Chancellor External Relations at Oxford Brookes University. His published work includes *Reason Over Precedents: Origins of American Legal Thought* (1993); *Legal Practice Management and Quality Standard* (1995); *The Future of National Identity* (2008); and numerous articles. He is a recipient of a Deutsche Akademische Austauschdienst Scholarship and the Webb-Smith Essay Prize from the University of Texas for his essay, "The Americanization of Blackstone's *Commentaries*." He has been an historical consultant for two television series: *Jeeves and Wooster* (Carnival Films, London Weekend Television, 1992) and *The American Revolution* (BBC, 1993). He is Treasurer of the American Society for Legal History.

## The Hon Justice Stephen Kós

### Fitzgerald v Muldoon v Wild

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*Fitzgerald v Muldoon* [1976] 2 NZLR 615 (HC) is one of the more significant constitutional decisions in New Zealand's common law. It is also one of the most recognisable. Cited recently in correspondence to a cabinet minister, he needed no reminder of its meaning (*Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982).

The case concerned a public statement made by the Rt Hon R D Muldoon after winning the 1975 general election. It purported to tell employers they need no longer make compulsory contributions to the New Zealand Superannuation scheme. Legislation confirming the change, retrospectively, would be introduced in the next parliamentary session. In the then-prevailing "first past the post" electoral system, its passage was inevitable. The Chief Justice, Sir Richard Wild, declared the announcement an unlawful pretended suspension of statutory obligation, in breach of the Bill of Rights 1688. All other relief was adjourned.

This paper will consider the origins of the Bill of Rights 1688 (briefly), its reception into New Zealand common law, the political circumstances in which *Fitzgerald v Muldoon* arose, how the case came to be instituted, the backgrounds, and attitudes to authority, of the principal protagonists Muldoon and Wild, the significance of *Fitzgerald v Muldoon* at the time it was decided, and its enduring significance as part of New Zealand public law.

**Justice Stephen Kós** graduated LLB (Hons) from Victoria University in 1981 (winning the Chapman Tripp Centenary Prize for his graduating year) and LLM from Cambridge University in 1985. He was a junior lecturer in law at Victoria University 1980-82, a partner in the Wellington firm Perry Wylie Pope & Page 1985-88, and a litigation partner at Russell McVeagh 1988-2005. He was chairman of partners of that firm 2003-05. Justice Kós joined the independent bar in 2005, and was appointed Queen's Counsel in 2007. He was one of the founding members of Stout Street Chambers in Wellington. He had a wide trial and appellate practice in commercial, contract, equity, competition, environmental and public law litigation. At the time of his appointment Justice Kós was Pro-Chancellor of Massey University, an Honorary Lecturer in Law at Victoria University and Chairman of the New Zealand Markets Disciplinary Tribunal, the stock exchange disciplinary tribunal. He was appointed to the High Court in April 2011. He sits in Wellington.

## Lucas Lixinski and Mats Ingulstad

### On Race, Sovereignty and International Resources: The Making of International Law in the Americas\*

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The paper explores the interrelationships between race, sovereignty and control over natural resources in the Americas in the first half of the 20<sup>th</sup> century. It will argue that, contrary to common belief, the Organization of American States came about not as a means to bring to life the ideals of Pan-Americanism, but as a vehicle to facilitate US domination of the hemisphere in its plight to procure strategic raw materials. Closely linked to the pursuance of warfare, these strategic raw materials facilitate the creation of doctrines and institutions for hemispheric security, trade and political integration, all the while promoting a deep-seated belief of racial superiority of (white) North Americans over (colored) Latin Americans. The historical evolution of the principle of Permanent Sovereignty over Natural Resources (PSNR) in international law in the Americas is the angle of analysis from which these considerations will emerge. Most of the literature dedicated to this principle looks at it from the perspective of the decolonization process in Africa and Asia from the 1960s onwards, using the United Nations as the organizational backdrop. We choose a different path, and look at the politics of strategic materials in the Americas. We will examine the politics of geologistics within the American continent, looking specifically at how the US procured strategic materials in Latin American countries.

**Dr Lucas Lixinski** is the Dean's Postdoctoral Research Fellow at the University of New South Wales Faculty of Law (Sydney, Australia). He holds a PhD in International Law from the European University Institute (Florence, Italy).

**Dr Mats Ingulstad** is a Postdoctoral Fellow at the Norwegian University of Science and Technology – NTNU (Trondheim, Norway). He holds a PhD in History from the European University Institute (Florence, Italy).

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## Mark Lunney

### England's Obedient Servant? The hidden dynamism in the development of Australian tort law 1901-1945

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This paper discusses the extent to which there was the development of an Australian tort law between 1901-1945. It begins by looking at reasons why asking such a question about this period is worthwhile and the reasons why taking reasoning and judgments in cases at their face value may be misleading. In light of this discussion, the paper then looks at a decision of the High Court of Australia in 1949, *Deaton's Ltd v Flew*, to argue that the application of English authority still provided a number of choices for Australian courts, choices that could be informed by factors applicable to Australia and not England. In this way, the development of the law was much more dynamic than might at first glance appear.

**Mark Lunney** is a Professor in the School of Law at the University of New England, Armidale, Australia. He trained as a solicitor in Brisbane before obtaining an LLM from the University of Cambridge. Between 1991-2003 he was lecturer, senior lecturer and reader at the School of Law, King's College London. He was an Associate Professor in the School of Law at the University of New England between 2003-2011 and from 2011-2012 he was Professor and Director of Research in the ANU College of Law. His research interests are the law of tort, and the history of the common law and legal profession. He currently holds an Australian Research Council Discovery Grant for his project on 'The history of tort law in Australia 1901-1945', and he has published extensively on the law of torts in both Australia and the United Kingdom (see, for example, Barker, Cane, Lunney & Trindade, *The Law of Torts in Australia* (5th edn, 2012) and Lunney & Oliphant, *Tort Law: Text and Materials* (5th edn, 2013). He is also a contributing editor to the practitioners' reference work *Tort Law* (2nd edn, 2007, Butterworths Common Law Series). He is the inaugural Australian member of the World Tort Law Society.

## Chiara Mannoni

### The origins of the concept of Public Cultural Heritage: the Laws on the protection of Art and Antiquities in nineteenth-century Rome and Athens.

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While there were earlier edicts regarding the preservation of historical art and artifacts, it was the so-called “*Edict Chiaramonti*” and “*Edict Pacca*”, published in Rome in 1802 and in 1820 respectively, that were the first extensive and widely inclusive laws regarding the preservation of the integrity of arts and antiquity, probably prompted by depredations of Napoleon, who removed many Italian artworks after 1797 to furbish the new *Musée Napoléon* in Paris. Greece, on the other hand, had suffered greatly from plundering antiquarians during Turkish rule and, soon after gaining independence, issued the “*Edict (Gesetz) on the scientific and artistic collections of the State*”, published in 1834 by the Bavarian Regency in Athens. This edict, which has not yet been analyzed by scholars, defined an advanced management model for national museums and archaeological sites. An overview of these three early examples of heritage legislation throws light on fundamental aspects of legal history regarding the protection of arts and antiquities, important in relation to contemporary attitudes to the tutelage and conservation of cultural heritage.

In this paper I intend to analyze these three edicts, especially some of their innovative categories, such as “*Vantaggio generale*” (General benefit), “*Esatta Nota*” (Art Inventory), “*Licenza d’estrazione*” (Licence for exportation), as well as “*Kreis und Dotationen*” (Grants and Allocation) “*General Konservator*” (General Conservator). My aim is to establish the origins of contemporary legislation on the protection of art and antiquities, and modern concepts of “Public Heritage”, “Collective Responsibility”, “National Catalogue” and “Conservation and tutelage”.

**Chiara Mannoni** is an Art Historian, BA. and MA. *cum Laude* at the University of Rome “La Sapienza”, MA. II level *Summa cum Laude* at the University of Siena. She has been a PRIN Research Fellow (Italian Ministry of Education) at the University “La Sapienza” for two years, doing research at the Secret Archive of Vatican and at the Capitoline Archive of Rome. Currently, Chiara is a Ph.D. candidate in History of Art at the University of Auckland with a UOA Doctoral Scholarship. She is studying the first legislations on the protection of Art and Antiquities, issued in nineteenth century Rome and Athens.

## **Courtney Mason**

### **The History of Colonial Surveillance Policies and Aboriginal Responses in Western Canada, 1870-1940**

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This paper investigates the colonial mechanisms of surveillance and repression that Nakoda First Nation peoples experienced from 1870-1940 on the eastern slopes of the Canadian Rocky Mountains (currently the province of Alberta). Beginning with missionary movements, the 1877 Treaty Seven agreements and the reservation system, government polices were designed to increase surveillance on local Nakoda peoples and assimilate their cultures. Instituted by Canadian governments and enforced by colonial agents and missionaries, surveillance legislation attempted to curb the ability of Nakoda peoples to pursue specific cultural and subsistence practices. Policies on hunting, fishing and gathering significantly constrained these practices as they were redefined as intolerable and illegal. Drawing on evidence from oral accounts with Nakoda elders and archival documents in the forms of newspapers and government reports, this paper will focus on how these restrictive laws had considerable cultural and health impacts in Nakoda communities. It is revealed how the manipulation of time, space and movement altered the structure of Aboriginal lives in ways that attempted to increase visibility, economic productivity and docility. Observation and surveillance were key factors in facilitating this process for members of the colonial bureaucracy. While this paper does assess how power was exercised through colonial policies, critically it also demonstrates how many community members responded to repressive legislation and creatively navigated colonial institutions and power structures.

**Courtney Mason** completed his PhD at the University of Alberta where he studied the displacement of Nakoda peoples in the formation of Banff National Park. His dissertation examined the history of colonial power relations and the experiences of Nakoda peoples in the Canadian Rocky Mountains. He currently is a postdoctoral fellow with the Indigenous Health Research Group at the University of Ottawa. He is now interested in how Oji-Cree and Dene communities of Northern Canada negotiate enduring colonial legacies as well as pressing health, food security and social issues by engaging in local food procurement.



## Josip Matesic

### Two Acts that Reformed Sabbatarianism in New South Wales in the 1960s

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New South Wales in the 1960s introduced a series of Acts which liberalised Sundays by overturning Sabbatarian legislation. The Acts themselves along with parliamentary debates recorded in Hansard are analysed to see the influence with which religious arguments had in either promoting or discouraging the changes in legislation. Other motivations, such as business or economic motives are also investigated to see which were the most influential.

While concentrating on the place of New South Wales, the people who are the focus are those with significant direct amounts of political power. The first Act that is investigated is the 1962 *Factories, Shops and Industries Act*. This Act allowed some shops, which were mostly food shops, to open on Sundays. This commercial change was followed in 1966 by the *Sunday Entertainment Act*, which allowed many social practices to occur on Sundays such as cinemas being open and people being legally allowed to play sport.

Sabbatarianism retreated in New South Wales in the 1960s and it is seen in two Acts: one with commercial implications and the other social. What the arguments were for and against these changes are examined to see what they say about what the public thought about religion and religious practice, social and commercial practices, but also the law.

**Josip Matesic** is a PhD candidate in history at the University of Wollongong. His thesis examines changes in Australian attitudes to religion in the twentieth century as reflected in public political discourses.

## **Tom Middleton**

### **The enforcement pyramid model in a corporate regulatory context**

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The historical development of the enforcement pyramid model in an Australian corporate regulatory context is discussed in this paper. Particular emphasis is placed on the role of the civil penalty regime in achieving the relevant regulatory objectives. The current Australian corporate regulatory framework is analysed with reference to world's best practice and public and private interest theories to both identify problems in that framework and suggest law reforms. The Australian experience may provide an informed basis for reforming New Zealand's corporate regulatory laws particularly in relation to the civil penalty regime. Reference is made to the New Zealand Law Commission's recent Issues Paper on Civil Pecuniary Penalties.

**Dr Tom Middleton** is an Associate Professor in the School of Law, James Cook University, Townsville. He is admitted as a Solicitor of the Supreme Court of Queensland.

He earned a Bachelor of Commerce and a Ph.D from James Cook University and, a Bachelor of Laws (Hons) and a Masters Degree in Legal Practice at Queensland University of Technology.

In 1999 he wrote a two volume book (looseleaf and on-line service) entitled "ASIC Corporate Investigations and Hearings," published by Thomson Reuters, Sydney. He currently updates this book 5 times per year and it has been in continuous publication for the past 14 years. It is the leading publication for legal practitioners in relation to the Australian Securities and Investments Commission's investigative and enforcement powers.

He has published numerous refereed articles and a number of these have been cited by the Courts, Academics and Law Reform Commissions in Australia and New Zealand. Those articles have also been utilised by government agencies including the Commonwealth Treasury in the context of proposals for law reform.

He is a foundation staff member in the School of Law and he currently teaches third and fourth year law subjects in both Townsville and Cairns.

## Peter Moore

### South Australian Lawyers 1837-1850: Profiling a Colonial Legal Profession

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This paper will compare and contrast the findings of Jeremy Finn's 'cohort study' of early New Zealand lawyers, 1841-1851.\* It will do this by profiling all of the practitioners admitted in South Australia during a comparable time-frame and by drawing on a wide range of details collected about the South Australian cohort. Thus, the paper will test the prosopographical method as much as the quality of the data.

Measured by Finn's primary criteria:

- qualification (as barrister or attorney/solicitor) and qualifying jurisdiction;
  - duration and location of practice experience before emigration;
  - imperial and intra- and inter-colonial mobility;
  - colonial admission and legal practice afterwards;
  - advancement and impacts through legal, executive and political office-holding;
  - extra-legal life including marriage and family, and social and cultural pursuits; and
  - success in colonial legal practice, and age and wealth at death,
- they present a remarkably similar profile.

The South Australians, too, proved to be English, attorneys, highly mobile, arriving in their later 30s, dying around 70, and satisfactory husbands and fathers, and practitioners and holders of minor legal offices. The exceptions prove the rule, however, for good or ill. The group's overall contribution to the colony is best measured against a minority's success in politics, socio-economic innovation, pastoralism and land speculation.

**Peter Moore** is a former South Australian legal practitioner and began working on a history of the South Australian legal profession at Adelaide University under Alex Castles in 1975. He is a PhD student at the University of Technology, Sydney, focussing on the development of legal professional culture in NSW, SA and NZ from the 1830s to the 1860s.

\* Jeremy Finn, 'The Founders of the New Zealand Legal Profession: The First Cohort of Lawyers 1841-1851' (2012) 25 NZULR 24

## Grant Morris

### A history of mediation in New Zealand's legal system

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The history of mediation in New Zealand reflects a number of influences and developments. While proto-types of mediation can be found in New Zealand's early industrial relations, the modern mediation movement is primarily a result of state-led reform in a variety of legal areas. Much of this reform has been influenced by overseas models emphasising New Zealand's role as a 'fast-follower' of alternative dispute resolution trends rather than an initiator. The rise of mediation in New Zealand has been ad hoc and pragmatic with a distinct lack of systematic development. This pragmatic change was a response to pressures such as the cost and delay involved in litigation, and major social trends which challenging traditional ways, including traditional approaches to resolving disputes. Mediation continues to play a vital role in the New Zealand legal system but the exponential growth of the 1980s and 1990s has slowed as mediation begins to clearly locate and confirm its 'territory' in the New Zealand legal system.

**Dr Grant Morris:** Senior Lecturer in Law, Victoria University of Wellington, specialist areas include NZ legal history, NZ legal fiction and alternative dispute resolution. Dr Morris is the author of *Law Alive: The NZ Legal System in Context* (OUP) and numerous articles and book chapters. His biography of Chief Justice James Prendergast will be published by Victoria University Press in 2014. Dr Morris is a committee member for ANZLHS and the book review editor for the Australia and New Zealand Law and History E-Journal.

## Amanda Nettelbeck

### Settler provocation, Aboriginal resistance and the law's leniency

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Provocation has had a controversial history in its legal evolutions as a partial defence accommodating acts of 'human frailty' within the boundaries of 'reasonable' conduct. Recent scholarship on the provocation defence suggests focusing not only on its history in the courtroom but also on the webs of social relations from which acts of retaliation emerge. What kinds of retaliation have received the law's compassion, and in conceding them, what structural social relationships has the law helped to normalise? This is an apt question for reconsidering the legal history of Australia's colonial frontiers, where provocation became a familiar defence enlisted by settlers to justify violent retaliations against indigenous theft of stock and property. This paper considers some of the dimensions of a more unusual case that came before Western Australia's Supreme Court in 1895, in which an indigenous man was tried and acquitted for the murder of a settler on grounds of 'the severest provocation'. As well as being unusual on these terms, this case resonates in a number of ways. At one level the defendant's spearing of the settler suggests another kind of law at work in the sphere of indigenous punishment of settler crime; at another level it speaks eloquently of the asymmetries in settler/indigenous relations that the law more typically served to normalise.

**Amanda Nettelbeck** is Professor in the School of Humanities at the University of Adelaide. She is co-author with Robert Foster of *Out of the Silence: the History and Memory of South Australia's Frontier Wars* (2012), *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (2007) and *Fatal Collisions* (with Rick Hosking, 2001). In progress is a co-authored book *Fragile Settlements: Aboriginal Peoples, Law and Resistance in Australia and Western Canada*, contracted to UBC Press.

## David Neufeld

### Canadian Law and the erosion of Yukon First Nation way of life

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This paper outlines how the twentieth century history of Canadian law and legislation reflects changing attitudes in the national government's expectations of, and latterly responsibilities to, the country's North. These laws rarely directly targeted Indigenous peoples, however the singular lack of consideration of Indigenous interests eventually led Yukon First Nations to call for the negotiation of a treaty to re-establish respectful relationships between First Nations and Newcomers. The legacy of these imperial attitudes continues to compromise the fulfilment of the initial expectations of their recent treaty (1993).

The paper builds upon Neufeld's research for Kluane National Park and Reserve published in:

*Indigenous Peoples and Protected Heritage Areas: Acknowledging Cultural Pluralism*, Chapter 10 in Transforming Parks: Protected Areas Policy and Governance in a Changing World, ed. Kevin Hannah, Douglas Clark and Scott Slocombe (New York/London: Routledge, 2007).

*Kluane National Park Reserve, 1923-1974: Modernity and Pluralism*, Chapter 10 in A Century of Parks Canada 1911-2011 ed. Claire Campbell (Calgary: Univ. of Calgary Press, 2011). <http://uofcpress.com/books/9781552385265>

**David Neufeld** is an environmental historian living and working in the Yukon Territory of Canada. He studies the intersection of knowledge and practice in both Western settler approaches to Canada's North and Yukon First Nations' ways of life in their sub-arctic boreal homelands. His reflexive research approach is grounded in 30 years as a community-based cultural researcher using archives and community oral histories as sources. His complementary experience of travelling the land with both "hunters" and "miners" has made him particularly sensitive to the detailed character of the contact between Indigenous and Newcomer through the twentieth century. As an Adjunct at Yukon College for over twenty years, Neufeld delivers programs in history and protected area management. More recently he contributed to this past summer's Yukon Arts Centre Gallery show with *The Landing*, an installation art piece investigating human relationships with place.

## Katie O'Bryan

### **Title: The history of water law in Victoria and the development of indigenous water rights**

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Victoria's Water Supply and Irrigation Bill 1886 was the subject of fierce and lengthy debate during the parliamentary session in which it was introduced. However at the end of the same session, the Aborigines Protection Law Amendment Bill 1886 received little and only last minute attention.

Both ensuing Acts were to have an enormous impact in Victoria in their respective areas of coverage. The *Irrigation Act 1886* shaped the direction of water management in Victoria for almost a century, and the *Aborigines Protection Act 1886*, described as 'the most draconian Aboriginal legislation of its time in Australia,' introduced the notion that Aboriginal people were a dying race, the remnants of which were to be absorbed into the mainstream. Neither Act involved Indigenous Australians in its development, but neither did Aboriginal people die out as predicted.

Almost a century later in response to the High Court's Mabo decision, the Commonwealth government enacted the *Native Title Act 1993* which enabled recognition of native title rights to water. Unlike the debate for the Aborigines Protection Bill, the debate for the Native Title Bill was at the time one of the longest parliamentary sittings in Australia's parliamentary history and involved significant Indigenous input. But did it result in better outcomes for Indigenous people as far as water rights were concerned?

This paper will outline various factors contributing to the absence of an Indigenous voice in the development of the 1886 Bills, and investigate, in light of the *Native Title Act* and recent water policy initiatives, whether Indigenous people are now able to participate, and if so to what effect, in the development of the regulatory framework for water management.

**Katie O'Bryan** is a PhD candidate at Monash University, undertaking a comparative study of the legal recognition of Indigenous rights to participate in the management of water resources. Prior to commencing her PhD she worked for over 10 years as a lawyer for native title claimants.

## Stefan Petrow

### **Adaptation and Innovation: Imposing law and Order in Van Diemen's Land 1803-1824**

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In the late eighteenth and early nineteenth centuries law and order problems challenged governmental power in Britain and the empire. Arguably, the problems were magnified in a penal colony such as Van Diemen's Land, where structures for imposing law and order had not been developed, convicts escaped into the bush to become bushrangers and terrorize settlers, and sheep stealing and smuggling were rife. A running sore for settlers was the absence of a superior criminal court to prosecute serious offenders, leaving settlers with the expensive and time-consuming option of travelling to Sydney for such prosecutions. In seeking to contain the threat of bushranging, Lieutenant Governors naturally harked back to British practice. They sought to deter bushrangers by declaring them outlaws, imposing martial law, resorting to capital punishment and offering large rewards for their arrest. All of these strategies had varying degrees of success. In Britain the army and citizens' bodies were used to deal with serious disorder and Lieutenant Governors in Van Diemen's Land relied on the military to detect bushrangers with the help of free settlers and some trusted convicts. They formed armed roving bands to hunt down bushrangers in the isolated parts of the island penal colony. While the military was a suitable weapon to deploy against bushranging in outlying areas, it was, according to British custom, less acceptable to use soldiers in urban areas for law and order tasks. In 1818 Lieutenant-Governor William Sorell, finding it difficult to recruit free settlers, adopted the innovative solution of forming a police force of serving convicts to deal with growing crime and disorder in the towns caused by an upsurge in transported convicts. This paper assesses the success of the various methods, old and new, used to impose law and order in Van Diemen's Land from 1803 to 1824.

**Stefan Petrow** teaches Australian and European history in the History and Classics Program at the University of Tasmania. He specializes in the legal history of Tasmania and has written a number of articles on policing in the nineteenth century.



## **Sangeetha Pillai**

### **The Constituent Power of the ‘People of the Commonwealth’: Reflections on Citizenship in the 1897-1898 Australasian Constitutional Convention Debates**

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In contrast to many national constitutions, the Australian Constitution is largely silent on who the Australian people are, or what rights and responsibilities they hold. This has led it to being described as ‘dull’, ‘democratically deficient’ and ‘half-sure of itself’ with respect to notions of citizenship and identity. However, in many ways, Australia’s road to federation was remarkably democratic for its time. The Constitution was debated by popularly elected delegates at the 1897-1898 Constitutional Convention, and was ultimately approved by the people themselves via a series of referenda. Moreover, it has been argued that the final constitutional text included ‘some of the most democratic provisions in the world at the time’. The tension between these contrasting portraits of Australian constitutional democracy is of ongoing significance when examining who the ‘people of the Commonwealth’ are, and the nature of their constitutional role: questions which have attracted considerable attention in recent times.

At the 1897-1898 Constitutional Convention, Australian citizenship, identity and democracy were discussed extensively and in considerable depth. Due to deep disagreements on material points, the delegates failed to reach consensus on these issues, and the Constitution ultimately leaves them largely in the realm of legal inference. However, in the course of debate, several delegates expressed nuanced and sophisticated perspectives regarding the constitutional role of ‘the people’. My paper will seek to outline these positions, which, to date, have largely escaped deep consideration by Australian constitutional scholars. Moreover, it will argue that analysing the arguments voiced at the Convention may aid the exploration of longstanding questions about the constituent power of ‘the people’.

**Sangeetha Pillai** is currently completing a PhD at the University of New South Wales under the ARC Laureate Fellowship Project ‘Anti-Terror Laws and the Democratic Challenge’. Her research focuses on the legal dimensions of Australian citizenship, and the challenges presented by anti-terror measures post-9/11. Sangeetha also teaches Public Law and Legal Research at UNSW. Prior to commencing her PhD, she worked as a commercial litigator, and as a research assistant for the Gilbert + Tobin Centre for Public Law at UNSW.

## Roderic Pitty

### Avoiding Australasian Drift: Michael Kirby's advocacy of trans-Tasman unity

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For over 30 years the former Justice of the High Court of Australia, Michael Kirby, has advocated (even when he held that role) that the contact between Australia and New Zealand “should be closer and the links more formal” (Kirby 2003: 1085). Yet, except for a rough and ready exchange with Robert Muldoon in the early 1980s, Kirby has been unable to inspire Australian or New Zealand politicians of influence to discuss this prospect, let alone persuade them to act. Nevertheless, in recent years Kirby has returned to elaborate on this prospect in an extensive way, although now with a sense of foreboding or pessimism, as a consequence of the imminent ANZAC centenary. He suggests that, if this occasion is not used to create an institutional procedure for encouraging closer links, like a trans-Tasman Council, then “there will probably never be another opportunity to spark ideas that go beyond the little steps of professional harmonisation” (Kirby 2010: 21). This paper will examine Kirby's advocacy of greater trans-Tasman unity in the context of his ideas about the influence of international law on domestic law, which have shifted since the early 1980s.

**Dr Roderic Pitty** is Associate Professor and Discipline Chair of Political Science and International Relations at the University of Western Australia. He has published chapters on Michael Kirby's cosmopolitan legal reasoning in *Global Citizens: Australian Activists for Change* (Cambridge University Press, 2008) and in *Appealing to the Future: Michael Kirby and His Legacy* (eds Ian Freckleton and Hugh Selby, Law Book Co. & Thomson Reuters, 2009, available through <http://www.michaelkirby.com.au/>). He has also published an essay about “The unfinished business of Indigenous citizenship in Australia and New Zealand” in *Does History Matter?* eds K. Neumann and G. Tavan, ANU, 2009.

Kirby, M. 2003, “The Unfinished Trans-Tasman Business”, speech in Auckland, 19 February 2003, published in *Commonwealth Law Bulletin* 28:2, 1083-91.

Kirby, M. 2010, “Trans-Tasman Federation – achievable, impossible, unnecessary?”, *Canterbury Law Review* vol. 16, 1-21.

## **Maria Pozza**

### **New Zealand's Modest but Constructive Role in the Development of Outer Space Law**

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Space is of greater relevance and importance now than it has been at any time in the last half century. It is being actively utilised by an increasing number of space faring states which are clearly aware of its strategic and tactical significance. Several treaties exist to safeguard space by directing how states may 'use' it. These treaties may be failing, as is clearly evidenced by recent treaty proposals presented by China and Russia, two major space-faring states. This presentation examines international frameworks which currently exist and whether those frameworks may be failing. Only by conducting relevant historical research, can an investigation into this problem begin.

Examining the international negotiations and debates which occurred makes clear that New Zealand played a positive role in the formation of the framework presently in place. New Zealand has always maintained a reputation of "good international citizen" and has served as a guide from which many states, some powerful, have sought advice. It is clear from the historical record that New Zealand made a modest but constructive contribution in the development of space treaties.

This paper utilises restricted archival material in order to demonstrate that during the historical development of the international law pertaining to outer space, New Zealand's role was important. New Zealand was highly instructive in the formation, negotiation and implementation of the Outer Space Treaty 1967, especially its arms control provisions. This paper will illustrate that New Zealand's historical involvement in outer space law was vast, and that New Zealand continues to have a role in this area of international law.

**Maria Pozza** is a Lauterpacht Visiting Fellow, Lauterpacht Centre for International Law, University of Cambridge, UK

**Wilfrid Prest**

**BLACKSTONE'S IMPACT**

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Since its first publication in four volumes between 1765 and 1769, William Blackstone's *Commentaries on the Laws of England* has never gone out of print, and arguably remains the most influential law book of all time, at least in the common-law tradition. A new edition of the *Commentaries* is currently being prepared for release by OUP in November 2015, the 250th anniversary of the appearance of the first volume.

This paper will present part of the general introduction to that new edition, providing an overview of the initial reception of the *Commentaries*, and sketching some aspects of the work's dissemination and influence within and beyond the common-law world over the past two and a half centuries. Jeremy Bentham's attack on the opening pages of Book I in his anonymously-published *A Fragment on Government* is well known, as are the protests made by Joseph Priestley and other protestant non-conformists against Blackstone's treatment of religious dissent in Book IV. But Irish and American patriots also found reason to criticise Blackstone's arguments and reject his conclusions, as did some English common lawyers. Indeed it seems clear that contemporary opinion on the merits of his book was more deeply divided than has been generally recognized. How then are we to explain its remarkable and long-lasting influence?

**Wilfrid Prest** taught history for many years at University of Adelaide, where he is currently Professor Emeritus in History and Law, and general editor of the Oxford Variorum edition of the *Commentaries*.

## Benjamin Ralston

### Timing isn't everything: Are Canadian courts making space for reconciliation in British Columbia's fisheries?

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In 2011, the Supreme Court of Canada upheld a trial court decision in the case of *Lax Kw'alaams Indian Band v. Canada* rejecting a claim that the plaintiff First Nations had a constitutionally protected Aboriginal right to engage in commercial fisheries for all species of fish within their traditional territories. In 2013, on the other hand, the British Columbia Court of Appeal upheld a ruling in *Ahousaht Indian Band v. Canada (Attorney General)* which found that plaintiff First Nations in that litigation did have a constitutionally protected Aboriginal right to “fish and sell fish” covering all but one commercially exploited marine species within their traditional territories. The factual findings in each case articulate distinct historical practices for the First Nations involved, but also similar histories of indigenous involvement in and exclusion from commercial fisheries. At the same time, each case has isolated claims of Aboriginal fishing rights from related claims for Aboriginal title to marine areas.

The Supreme Court of Canada has stated that Aboriginal rights are constitutionally protected in the Canadian constitution to reconcile the prior occupation of Canada by indigenous peoples with the Crown's assertion of sovereignty. Reconciling ‘prior occupation’ with Crown sovereignty has both a historical and a spatial dimension. To what extent is the former being privileged over the latter? This talk will briefly explore the extent to which historical reconciliation is being privileged over spatial reconciliation by examining the analogous but distinct legal histories informing the decisions in *Lax Kw'alaams* and *Ahousaht*.

**Benjamin Ralston** is currently pursuing a Master of Laws (LLM) at the University of Otago in relation to indigenous involvement in marine spatial planning in Canada and Aotearoa/New Zealand. Prior to coming to New Zealand, Benjamin completed his Bachelor of Arts and Juris Doctor degrees at the University of British Columbia and practiced law in the city of Vancouver.

## Holly Randell-Moon

### The Secular Contract: The British Monarchy and White Diasporic Sovereignty

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Using the work of Charles W. Mills, this paper critically interrogates how legal and political characterisations of the law as secular work to disavow settler states' racialised foundations in colonial violence in the form of a "secular contract". The secular constitution of states such as Australia and New Zealand presents these nations as liberal and autonomous even as their formation through the imprimatur of the British Crown continues to involve symbolic rituals of exchange and deference to the British monarchy. The paper focuses on two state visits by Prince William to Australia and New Zealand in 2010 and 2011 and analyses them as examples of what Goldie Osuri and Bobby Banerjee describe as the maintenance of "white diasporic loyalty". I conclude that secularism must be re-thought of as not simply the operation of law without religion, but also, as complicit with the ways indigenous sovereignties in settler nation-states are negated and de-legitimised through white diasporic sovereign ties.

**Holly Randell-Moon** is a Lecturer in Communication and Media Studies at the University of Otago, New Zealand. She has published widely on race, religion, and secularism in the journals *Critical Race and Whiteness Studies*, *borderlands* and *Social Semiotics* and in the edited book collections *Religion, Spirituality and the Social Sciences* (2008) and *Mediating Faiths* (2010). Her publications on popular culture, gender, and sexuality have also appeared in the edited book collections *Common Sense: Intelligence as Presented on Popular Television* (2008) and *Television Aesthetics and Style* (2013) and the journals *Feminist Media Studies* and *Topic: The Washington & Jefferson College Review*. She is the Editor of the journal *Critical Race and Whiteness Studies*.

## Jesse Roth

### Abstract: The Full Māori Jury, 1862 to 1965

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The full Māori jury system stands out as an interesting colonial experiment unique to New Zealand. The Māori jury system existed from 1862 until 1965, surviving three different phases of governmental policies regarding race relations: amalgamation, assimilation and integration. The establishment of the Māori jury system was primarily a means by which the colonists sought to incorporate Māori into their legal system and provide them, at least superficially, with greater reason for belief in the justice and integrity of the newly imposed laws. Although the Māori jury was infrequently used, this was not the result of Māori apathy towards the system. Rather, significant hurdles existed to its use, and it remains unclear the extent to which Māori were actually aware of their statutory right to request such a jury. Analysis of decisions of the Māori jury demonstrate how the system enabled, to a limited extent, the incorporation of Māori perceptions of society and culture into the application of the colonial laws. The incidence of the Māori jury is a fascinating part of our legal and social history which demonstrates an application of a fundamental concept within European law that one ought to be tried by a jury of his or her peers. In the aftermath of the Hunn Report, and the development of concepts of racial integration, the Māori jury system was abolished as an anachronism. Yet, I argue, this largely ignored historical feature of our legal system offers significant insight into continuing debates over the incorporation of indigenous peoples and their values into legal systems. It also suggests the potential value of the establishment of a parallel system of justice.

**Jesse Roth:** I am a student at Otago University in my 6<sup>th</sup> year of study. I have completed a BA with honours (1<sup>st</sup> class) in history, and am currently completing my final year of a LLB with honours. My main historical interests are in intellectual history, colonial history, and race relations history. As a student of both law and history I am interested in legal history, and specifically legal history related to race relations in New Zealand.

## Lyndall Ryan

### Was New Zealand part of New South Wales 1788-1817?

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Among the instructions given to Governor Phillip in 1787 were details of the boundaries of the Colony of New South Wales which appeared to include parts of New Zealand. If this is the case what were the legal ramifications for the colonists in New South Wales and the New Zealanders?

This paper takes both a British imperial and a trans Tasman approach to the question by considering the evidence in three critical sources 1788-1817: the despatches between the British government and the NSW governors; key legal cases in the NSW courts involving business transactions in NZ; and the diplomatic visits of key Maori leaders to Sydney as reported in the Sydney Gazette.

The paper finds that until 1817 the NSW governors and the courts appeared to consider that New Zealand lay within the political boundaries and legal jurisdiction of NSW and that some Maori chiefs appeared to consider that the governor of NSW was legally bound to offer them protection from American traders. These beliefs appear to have been supported by the British government which was concerned to limit French interest in the region. With the defeat of the French in 1815 however, the British Government sought to limit the colony's boundaries and in a despatch in 1817, made it clear that the NSW governor no longer had political jurisdiction over New Zealand.

The paper concludes that the Napoleonic wars played a critical role in shaping the ways the British government and the NSW governors considered the colony's original boundaries. While a potential French threat existed in the Tasmania region, the British government appears to have been prepared to defend its uncertain claim to New Zealand. With the defeat of the French however it no longer considered New Zealand as a vital part of Empire. The NSW governor disagreed but was firmly overruled by his superiors in London.

**Lyndall Ryan** is Research Professor in the Centre for the History of Violence at the University of Newcastle. Her most recent publications include: *Tasmanian Aborigines: A History Since 1803* (2012) and *Theatres of Violence: Massacre, Mass Killing and Atrocity throughout History* (2012), co-edited with Philip G. Dwyer, an article on the Black Line in Tasmania in the *Journal of Australian Studies* (2013) and a special issue of the *Journal of Genocide Research* (2013) on colonisation and massacre 1780-1820 co-edited with Philip G. Dwyer. Her current projects include a study of trans- Tasman relations 1780-1820 and an online map of frontier violence across Australia. Her email address is: Lyndall.Ryan@newcastle.edu.au.



## Katherine Sanders

### The Kelburn Raid - sex and the law in wartime Wellington

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In April 1918, on a Saturday night, police officers entered a house in Kelburn. Newspaper reports said that there were seven women and ten men, the majority of whom were military officers, on the premises. Five women were charged under the Additional War Regulations 1916, one with “with keeping a house of ill-fame”, the others with assisting with the management of the premises.

The “Kelburn Raid”, as it came to be known, was described in the *New Zealand Truth* newspaper as “The Sensational Scandal which has Worried Wellington”. The trial of the women in the Magistrates’ Court, their conviction and subsequent successful appeal to the Supreme Court was covered in detail by local and national newspapers. Though a number of prosecutions had taken place under the War Regulations relating to prostitution, it was the Kelburn Raid that enthralled the wartime public.

This paper explores ways of interpreting the significance of the Kelburn Raid for the communities of wartime New Zealand. Though what really went on in the house on Upland Road, Kelburn remains mysterious, there is much to be gleaned about attitudes to sex and relationships between men and women during the First World War. This paper explores the relationship between social and legal ordering in wartime, arguing that the regulation of sexuality reflects wider anxieties about status and power. Law monitors and creates social boundaries as legal processes inscribe or reinscribe social ordering upon individuals in a public forum. Law appears in this story as both punitive and generative - as a language and a resource both for social control and for those advocating social change.

**Katherine Sanders** is a senior lecturer at the University of Auckland, Faculty of Law with research interests in property law, public law and legal history. Katherine joined the Faculty in 2009 from practice in London where she acted for the Crown in public law litigation. Previously, she was clerk to the Rt Hon Justice Blanchard at the Supreme Court of New Zealand. Katherine is a graduate of the University of Auckland and the Yale Law School.

## Amanda Scardamaglia

### Understanding Colonial People, Power and Place through the Prism of Colonial Trade Mark Registrations

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Trade marks are often seen as an expression of the society in which they are registered and used. In this way, registered trade marks can reveal much about the prevailing legal, social, cultural, economic and political climate of the time. For example, parallels can be drawn between trade mark registrations and significant policy changes. Trade mark registrations can also speak to significant world events. The social significance of trade marks as language and as a form of cultural expression has also been explored at length. Furthermore, some trade mark scholars have drawn the connection between trade mark registrations and firm performance, as well as charted the association between registration data, innovation and industrial change. While these connections have proved to be a popular subject of examination in the realm of modern trade mark registrations, the significance of historical trade mark registrations in this context is an area that has been gravely underdeveloped, most notably in Australia.

Thus, this paper sets out to explore the intersection between colonial trade mark law and the legal, social, cultural, economic and political climate of the time. Drawing on colonial trade mark registration data, this paper will delve into the revelatory significance of trade marks, as a reflection of 19th century colonial Australia, mapping the number and types of applications and registrations as the prism through which to better understand colonial people, power and place.

**Dr Amanda Scardamaglia** completed her LLB (Hons) and BA at The University of Melbourne before being admitted to practice as an Australian Legal Practitioner in the Supreme Court of Victoria. More recently, she completed her PhD at The University of Melbourne, entitled 'A History of Trade Mark Law: The Colonial Trade Mark Regime'. Her research is in the area of trade mark law, especially the historical development of trade mark law in Australia and in other jurisdictions. Recent works include 'Misleading and Deceptive Conduct in Australia: Google Inc v Australian Competition and Consumer Commission' *European Intellectual Property Review* (2013, forthcoming); 'Opening Up the Australian Archives on Colonial Trade Mark Registrations' (2013, forthcoming) *Australian Intellectual Property Journal*; 'Are you Nuckin Futs? Registering "Scandalous" Trade Marks in Australia' (2012) 34(9) *European Intellectual Property Review*; 'Protecting Product Shapes and Features: Beyond Design and Trade Marks in Australia' (2012) 7(3) *Journal of Intellectual Property Law and Practice* and 'The Colonial Trade Mark Regime: Parallel Rationales, Theories and Frameworks' (2011) 22 *King's Law Journal*.

## **Eugene Schofield-Georgeson**

### **The Right to Silence in Colonial New South Wales**

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This paper locates the emergence of the right to silence within a specific social history in order to illustrate its importance to the contemporary rule of law in New South Wales. At the time of writing this abstract, the New South Wales Government has recently passed two Acts poised to destroy the right to silence - one of the State's most basic civil and political rights. The Acts are a neoliberal political measure designed to speed-up trials and cut costs by enforcing pre-trial disclosure of criminal defences and abolishing the prohibition against adverse inferences in criminal trials. Incidentally, the Acts increase the coercive power of the State while eroding the civil and political rights of the most vulnerable and marginalised members of society - legally aided Aboriginal and non-English speaking background defendants.

The creation of the right to silence in colonial New South Wales represents a milestone in the establishment of civil and political rights in Australia. At this moment of its repeal in New South Wales, the right to silence requires historical engagement, not merely as a progressive instrument of 'Whig history', but as a powerful tool of the people against state terror and a hard-won concession against the hegemony of the ruling-class in the late eighteenth and early nineteenth centuries. Indeed, while the scaffold and triangles have been all but disassembled, the social relationships and implications intrinsic to these laws nevertheless linger.

**Eugene Schofield-Georgeson** has practiced as an industrial lawyer in Sydney and a criminal lawyer with Aboriginal legal aid in the Northern Territory of Australia for some years. He is a current PhD candidate at Macquarie University in Sydney.

## Armanda Scorrano

### Judicial Constructions of Motherhood in Colonial Australia: Towards a Feminist Legal Historiography

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Feminist legal historians have paid limited attention to the law's construction of 'motherhood' in the Australian colonies. As a key institution of power, responsible for the maintenance of order, the judiciary plays an active role in the maintenance of particular formulations of motherhood. Just as 'woman' is a socially constructed category, so too is 'mother', with both categories carrying expectations of particular gendered behaviours. The way in which the institution of motherhood is conceived in each society serves specific social, economic and political purposes. The law is intimately involved in this process. This paper takes a preliminary look at judicial approaches to mothers and the part played by the institution of law in colonial formulations of motherhood, with a view to exploring the function colonial constructions of motherhood served in society.

**Armanda Scorrano** is a legal historian at UTS. She is currently working on AustLII's Australasian Legal History Library and teaches in the Communications program. Her research interests include feminist legal history, nationalism, and national identity. Her recently completed PhD addresses issues of national representations in Australian museums. She has published in the *Journal of Australian Studies* and *Public History Review*, and is coauthor of *The 'People's Park': Centennial Park, a history* (with Paul Ashton and Kate Blackmore, forthcoming 2013).

## **Rogena Sterling**

### **Biopower and the Erasure of Intersexuals and Gender-variance**

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Biopower is the formation of a 'truth', which determines the way we live our lives and how they are controlled. It is a form of mechanisms and calculations of power to manage and administer individuals and the population in general that is characterised by two axes: anatomo-political (discipline of the body), and bio-political (population management). The power govern one's life becomes the most fundamental function of the state through various social institutions, such as social policy, and medical control mechanisms, economic exploitation and state power. From birth every individual is born into a life regulated by official legislation and other regulations through institutions of the state. The 'necessity and utility' of sex/gender precepts became an indispensable or beneficial pre-condition of harmonious and productive social order through public safety and public decency to prevent the "degradation" of the current patriarchal system. Disruption to the heterosexual binary becomes the justification for their overt regulation by punishing deviance, and putting pressure on heterosexual individuals to make use of the heterosexual props and affording benefits to those reinforcing rather than subverting this boundary. This truth relied on the creation and dissemination of knowledge in particular areas of inquiry, epistemology - the study of knowledge and justified belief. The body became a 'materialised' construction of 'naturalising' forces of gender power. The aim is to show how biopower is tightly connected with enforcement of heterosexuality and the erasure of intersex in society.

**Rogena Sterling** -BA, LLB, LLM (honours with distinction), PhD (Law) Candidate  
Topic: Creating legal and social space for the gender-variant, such as intersexuals.

After graduating with a BA, Rogena taught English both in New Zealand and overseas. On returning to New Zealand, Rogena came back and set up an oriental medical college and later established an English language school. Changes to the market and governmental policy forced the sale of this school.

Following the sale of the language school an opportunity arose for Rogena to complete the LLB and LLM programmes at the University of Waikato. This had been a long held dream. Due to personal circumstances there was an opportunity that led to the discovery of a hidden intersexual identity with the knowledge of early surgeries and the help of the academic library. This culminated in Rogena's current project to create legal and social space for the gender-variant, those who do not fit the male female binary.

While a PhD Candidate, Rogena has also worked on a literature review for governance in the Pacific, completed a research into the review of a position at the Student Union which was implemented, and been on panels with the Human Rights Commission on Intersex.

Rogena is currently tutoring Jurisprudence. During the PhD study so far, Rogena has presented papers at "Justice in the Round - Perspectives from Custom and Culture, Rights, and Dispute Resolution" in April 2011 and "Works in Progress – The Next Generation" in October 2012

## Michael Stuckey

### Title: Representations of Science and Natural Theology in Palgrave's Legal and Institutional Historical Projects

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Francis Cohen was born in London in 1788. He was educated at home and was articled as a clerk to a London solicitor's firm in 1803. He remained there, rising to the position of managing clerk, until 1822 when he took chambers in the King's Bench Walk, Temple. In 1827 he was called to the bar at the Middle Temple, and for several years engaged in pedigree cases before the House of Lords. While a solicitor, and then while at the bar, Cohen was interested in literary and antiquarian studies; and around 1814, he began contributing to the *Quarterly Review* and the *Edinburgh Review* on such topics. He converted to Anglican Christianity before his marriage to Elizabeth Turner in 1823. Cohen also changed his surname to "Palgrave", close to the time of his marriage.

This paper will consider the connections made between legal history and: natural theology, in Palgrave's *Truth and Fictions of the Middle Ages: the Merchant and the Friar* (1837); and, natural science and empirical methods, in his correspondence with the Royal Society of London in 1835 and 1840, and with the Statistical Society of London in 1836, 1843 and 1859.

The paper will focus on the significance of Palgrave's work in terms of his interest in science, in particular the compilation and analysis of statistical data, evidencing his empirical, innovative approach and concern for a model of progress as a way of describing an historical process or sequence, although not necessarily in a determined or teleological sense.

**Professor Michael Stuckey** is the Head of Law at the University of New England. He teaches and researches in legal history and is the author of numerous books and articles on legal history, property rights and native title. His qualifications include: B.A.(Hons), LL.B, LL.M.(Hons) PhD. (Sydney) Grad.Dip.P.L.T. (U. Technol. Syd.), and he has been admitted to practice as a Barrister and Solicitor in Australia.

## Abby Suszko

### Whose ‘one law for all’? An examination of the populist perception existent throughout the Foreshore and Seabed Debate

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Equality, justice and egalitarianism are core facets of Aotearoa/New Zealand’s psyche. New Zealanders will work themselves “up into paroxysms of righteous indignation”<sup>1</sup> at any perceived threat to these values. Nowhere recently was this more evident than during the Foreshore and Seabed Debate.

The Debate erupted following the Court of Appeal decision of *Ngati Apa v Attorney-General* [2003] 3 NZLR 643, which was widely misrepresented in the media. During the Debate the public majority argued that any recognition of Māori rights in the zone would be a denial of ‘one law for all’ and result in inequality based on race.

This paper examines that populist view of equality. It deconstructs the populist notion of ‘one law for all’ to reveal how in reality it denies equality to Māori. Moreover, it seeks to comment on how this perception informed the legislative reaction to the Court of Appeal decision. In the process it aims to highlight other interpretations of ‘one law for all’ that emerged throughout the Debate, and concludes by suggesting an alternative perception as a way forward; one that embraces, rather than denies, difference in rights recognition.

**Abby Suszko** (LLB, BA(Hons) Māori Studies, PhD Otago), is a Lecturer in Aotahi: Māori and Indigenous Studies at the University of Canterbury. Abby’s research focuses on theories of equality and rights employed in contemporary debates around Indigenous Peoples claims to natural resources. Her work is driven by a desire to help inform such debates, and to ultimately work towards implementing sustainable solutions.

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<sup>1</sup> J R Lucas “Against Equality” (1965) 1 *Philosophy* 296 at 296

## **Sue Tappenden**

### **The Story of Equity: from Ancient Greece to present day New Zealand.**

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There is no set definition of the term 'equity'. Some people use the word 'fairness' to describe the ethos of equity, whereas some modern academics prefer to restrict the meaning of equity to the 'body of rules extrapolated by the Court of Chancery'. It is also possible to say that equity provides a remedy for unconscionable behaviour when no other manifestation of law will do so. For my part the meaning of equity lies in the past as well as the present. Equity has played an important role in the history of law of England and its influence has spread as the common law spread across the world. The effect of equity has increased flexibility in law and has enabled judges to look further than the letter of the common law or statute and give remedies that suit the situation where they are justified. The body of law we know as equity came to New Zealand along with the settlers from the United Kingdom. Everywhere that English law spread so too did equity so the history of equity is bound up with the history of England. This paper will show how equity emerged as a result of subjects of the English throne seeking justice from the King when ordinary law failed them. It will describe the influences to which the English Monarch was subject and the power that gave the King the authority to exercise a discretion in the name of justice. Finally it will examine equity in modern New Zealand and give examples of the way those early influences have shaped the use to which equity is being put today.

**Sue Tappenden**, lecturer, *Te Piringa*, Faculty of Law, University of Waikato.

I returned to New Zealand in 2001 after 10 very happy years as an academic in the UK. In almost 13 years at the University of Waikato I have taught Land law, Equity, Trusts & Succession, Jurisprudence and Legal Skills. My teaching often incorporates blended learning techniques. I have published and given conference papers in these areas, the most recent being an article in the International Journal of Innovation in the Digital Economy, published by IGI Global in the USA, being an account of the use of blended learning methods to increase student participation in tertiary study. I have co-authored a textbook on Equity, Trusts and Succession for Thomson Reuters (due later 2013) for which I researched the origins and history of equity. Although the research was primarily focused on the law itself, I found the history of the way equity had developed and its early origins fascinating. It was this interest that led me to write the paper on the history of equity from Ancient Greece to modern day New Zealand.



## Joshua Tate

### Episcopal Power and Royal Jurisdiction in Angevin England

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During the second half of the twelfth century, powerful and charismatic bishops presented a threat to the emerging jurisdiction of the king's courts. By contrast, King John was able to fill key episcopal vacancies with loyal bureaucrats who acted as servants to the king. This paper will consider how the assertion and subsequent cession of power by English bishops under the Angevin kings shaped the developing jurisdiction of the common-law courts, particularly in disputes over advowsons, or rights of presentation to churches. The evidence suggests that the bishops played a significant role in the development of the early common law, first by sending litigation into the king's courts and later by declining to challenge the primacy of royal jurisdiction.

**Note:** this paper is being presented as part of the ALHS panel entitled Power, Place, and Presence in Anglo-American Legal Landscapes with Associate Professor Craig Evan Klafter and Professor Christopher Tomlins. The panel abstract reads: In the past fifty years, legal history has become the most heavily populated “theory and perspective” subject in the contemporary American law school. That growth has been accompanied, inevitably, by immense and increasing diversity. Legal history's traditional roots in English medieval and common law history have been supplemented by waves of interest in distinctively American subjects, and, somewhat more recently, by a proliferation of methodological, theoretical and interpretive perspectives. This panel will present three distinct but related examples of how legal history is currently being pursued in North America, each attentive to one or more aspects – power, place, and presence – of the Dunedin Conference theme. Joshua Tate will present a paper that speaks to the continuing vitality of medieval and early common law history in the American legal academy, and that simultaneously demonstrates how that tradition can illuminate endlessly interesting questions of power and jurisdiction. Through a case study exploration of American Indian law, Craig Evan Klafter will demonstrate how the expansion of American legal history has seen the field opened to subject areas more or less completely ignored half a century ago. Finally, Christopher Tomlins will offer a paper that reflects upon slave rebellion as a subject for legal history and upon the role of literary texts in furnishing interpretive perspective for historical inquiry.

**Joshua C. Tate** is Associate Professor of Law at Southern Methodist University Dedman School of Law where he has taught since 2005. He has also been a visiting faculty member at the University of Pennsylvania Law School. He holds both a J.D. and a Ph.D. (History) from Yale University, where he was Executive Editor of both the *Yale Law Journal* and the *Yale Journal of International Law*. Before joining SMU, he clerked for the Hon. Carlos F. Lucero of the U.S. Court of Appeals for the Tenth Circuit, and was a Ribicoff Fellow at Yale Law School (2003-04), and a Golieb Fellow at NYU Law School (2004-05). His research and teaching is concentrated in the areas of legal history, property, and wills and trusts. His articles on modern inheritance law and the legal history of ancient Rome, medieval Europe, and nineteenth-century America have appeared in the *Journal of Legal History*; *Yale Journal of Law and the Humanities*; *Journal of Law and Religion*; *U.C. Davis Law Review*; *Real Property, Probate, and Trust Journal*; and *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. He has given invited presentations at numerous academic conferences, colloquia, and workshops both in the United States and abroad. He is currently engaged in a study of the development of property rights and remedies in medieval England, focusing on advowson litigation.

## Christopher Tomlins

### Styron's Nat: Or, The Metaphysics of Presence

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The modern American public became acquainted with the Southampton (Virginia) slave revolt of 1831 largely through William Styron's "realist" fictionalized autobiography of the rebellion's leader, entitled *The Confessions of Nat Turner* (1967). Rejecting the Turner of record – a "dangerous religious lunatic" – Styron stressed his interest in "subtler motives, springing from social and behavioral roots" that would allow the man to be "better understood." But Styron's attempts to "humanize" Turner – make him understandable – avoid Turner's own statement of his reality, which is entirely spiritual. Modern legality practices exactly the same avoidance, elaborately deploying claims about the real (human) to displace metaphysics (justice, God, &c). The result in each case is a depiction of reality haunted by that which the depiction avoids. In this paper I ask what calls these fictive realities into being, and what it will take to rescue Nat Turner, and law, from modernism's attempts to make them understandable.

Note: this paper is being presented as part of the ALHS panel entitled Power, Place, and Presence in Anglo-American Legal Landscapes with Associate Professor Joshua C. Tate and Associate Professor Craig Evan Klafter. The panel abstract reads: In the past fifty years, legal history has become the most heavily populated "theory and perspective" subject in the contemporary American law school. That growth has been accompanied, inevitably, by immense and increasing diversity. Legal history's traditional roots in English medieval and common law history have been supplemented by waves of interest in distinctively American subjects, and, somewhat more recently, by a proliferation of methodological, theoretical and interpretive perspectives. This panel will present three distinct but related examples of how legal history is currently being pursued in North America, each attentive to one or more aspects – power, place, and presence – of the Dunedin Conference theme. Joshua Tate will present a paper that speaks to the continuing vitality of medieval and early common law history in the American legal academy, and that simultaneously demonstrates how that tradition can illuminate endlessly interesting questions of power and jurisdiction. Through a case study exploration of American Indian law, Craig Evan Klafter will demonstrate how the expansion of American legal history has seen the field opened to subject areas more or less completely ignored half a century ago. Finally, Christopher Tomlins will offer a paper that reflects upon slave rebellion as a subject for legal history and upon the role of literary texts in furnishing interpretive perspective for historical inquiry.

**Christopher Tomlins** is currently Chancellor's Professor of Law at the University of California and formerly a Research Professor at the American Bar Foundation, Chicago. Before joining the American Bar Foundation in 1992, he was Reader in Legal Studies at La Trobe University, Melbourne. He holds a B.A. from Oxford University (1973), Master's Degrees from Sussex University (1974), The Johns Hopkins University (1977), and Oxford University (1977), and a Ph.D. from Johns Hopkins (1981). He has written or edited nine books, among them *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (1985); *Law, Labor and Ideology in the Early American Republic* (1992); and *Freedom Bound: Law, Labor and Civic Identity in Colonizing English America, 1580-1865* (2010). He has been editor of the *Law and History Review* and of *Law & Social Inquiry*, and currently edits the Cambridge University Press book series *Cambridge Historical Studies in American Law and Society* and (with Michael Grossberg) *New Histories of American Law*. His publications have been awarded the Surrency prize of the American Society for Legal History, the Littleton-Griswold prize of the American Historical Association, the James Willard Hurst prize of the Law and Society Association (twice), and the Bancroft Prize of the Trustees of Columbia University.



## Willem van Gent

### The 1974 'Town Hall Inquiry' into the Milan Brych cancer treatment at Auckland Hospital

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In the 1970s, Czech-born 'Cancerman' Milan Brych became the centre of arguably the largest medical controversy in New Zealand history. Working as a medical doctor in Auckland Hospital, Brych claimed to have developed a breakthrough treatment for cancer, quickly becoming a household name through significant media attention and vocal patient support. Simultaneously, however, his secretive treatment and bold claims were viewed with suspicion by other doctors, leading to the suspension of his treatment pending investigation. It was later uncovered he lacked medical qualifications.

The Brych story reveals familiar faultlines in the social history of medicine, between 'expert' and popular opinion, between science and faith, between con and cure. However, there has been little historical analysis of the Brych controversy. This paper begins the process by examining the 1974 'Town Hall Inquiry' into cancer treatment at Auckland Hospital. The Inquiry illustrates a clash of world views. Brych's critics in the medical profession believed, for the protection of the public, that the controversy could only be safely resolved through clinical trials and the publication of the details of his secretive treatment. On the other hand his supporters, buoyed by Brych's message of hope and convinced through personal experience of his healing powers, argued that such concerns were of secondary importance. This paper will show that the Town Hall Inquiry was not merely a pivotal event in the Brych saga; it formed part of the broader social climate of the 1970s, one that was becoming increasingly critical of certain aspects of modern healthcare.

**Willem van Gent** is a first-year PhD student at the University of Auckland with an interest in the history of alternative medicines and scientific controversies. His thesis topic tracks the history of the Milan Brych cancer treatment controversy from its beginnings in Auckland Hospital through Australia, Rarotonga and California. In 2012 he completed an MA thesis on the history of chiropractic in New Zealand.

## **C H (Remco) van Rhee**

### **The role of continental European superior courts in shaping the law in the Early-Modern Period (15th-18th c.)**

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My paper will address the role of continental European superior courts in the shaping of the law in the absence of a duty to provide reasons for their judgments. The character and role of case reporting by individual judges and practitioners on the European Continent will be focused on, and especially the status of the 'reasons' provided in such reports for individual court decisions. It will appear that the situation on the European Continent was very different from that in England in the same period. It will also appear that the identity and the status of the authors of collections of case law was of primary importance for the authority of such collections.

**C H (Remco) van Rhee (the Netherlands)** PhD, Leiden University, 1997; Professor of Comparative Civil Procedure and European Legal History, Maastricht University, Faculty of Law; Fellow of the Maastricht European Private Law Institute; member of the European Law Institute; Director of the programme 'Foundations and Principles of Civil Procedure' of the Ius Commune Research School; Council Member of the International Association of Procedural Law; Co-director of the Public and Private Justice seminar at the Inter-University Centre Dubrovnik, Croatia; founding member and Vice President of the European Society for Comparative Legal History; Editor-in-Chief of the Chinese and Comparative Law book series (Brill Publishers, Leiden); Editor-in-Chief of the History of Private Law book series (Brill Publishers, Leiden); member of the editorial board of the Legal History Review; member of the editorial board of *Tijdschrift voor Civiele Rechtspleging* (Dutch journal of civil procedural law); expert to the Council of Europe (civil procedure); member of various scholarly associations; Visiting Professor at various law schools in Europe, the USA, Russia, China and South Africa.

## Marian Walker

### **Policing Hospitality: Tasmania and the Guest House Registration Act of 1937**

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In 1855 the celebrated British writer and world traveller, William Howitt, visited Tasmania. This was the year that the colonists achieved self-government and changed the island's name from Van Diemen's Land in a quest to re-invent their identity as a hard-working and respectable people. Howitt travelled extensively through the island and although delighting in the scenery, climate and 'English' atmosphere, complained bitterly about the hospitality of the inns and innkeepers. One night after staying at Oatlands, half way between Launceston and Hobart, he penned a particularly memorable description of his stay at the local inn. He wrote: 'Here everything was cold — the day was bitterly cold, the room was cold — there was no fire in it, the dinner was cold, and the people were cold ...' Howitt's experience marks the beginning of a subsequent eighty-year struggle on the part of Tasmanians to both throw off the negative connotations of the convict stain associated with slovenliness and depravity and efforts to improve hospitality standards — tasks that they came to understand were inextricably intertwined. This paper addresses the conference theme of people, power and place by following the efforts of Tasmanian tourism champions to enhance the island's image by improving hospitality standards through the organs of both the police department and ultimately the controversial Guest House Registration Act of 1937. It suggests that the struggle the islanders' experienced to improve hospitality standards was a symptom of the greater struggle they had to throw off the convict stain.

**Dr Marian Walker** is a consultant historian and University Research Associate with the School of Humanities at the University of Tasmania. She has a career background in tourism and specialises in the social and cultural history of travel and tourism. Her research interests include public memory, the concept of 'image' as a social and cultural construct, the interpretation of tourist sites and tourism in nineteenth century British colonies.

## Angela Wanhalla

### **Race, War and Marriage: The US Military and American Law in the South Pacific, 1941-1949**

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During the Pacific war the limits of state and federal laws on marriage, immigration and naturalization were severely tested. This paper looks at the mechanisms military authorities used to deny American servicemen the right to marry across racial lines through the exportation of race-based US state and federal laws to overseas territories, such as New Zealand. Those men who sought to marry were required to make a marriage application, which included providing proof of the woman's eligibility for admission to the United States. When the woman in question was Maori, applications for marriage were met with widespread uncertainty over whether 'Polynesians' were racially admissible under US immigration and naturalization laws, a situation first brought to the attention of US officials and lawmakers by the case of Patricia and Henry. Described as 'the first definite opinion on the applicability' of the Nationality Act 1940 to those of Polynesian ancestry, the case set an important precedent, which the US consulates in Noumea, Sydney, and Suva were obliged to apply to future applicants. Visa complications of this nature would not be resolved until 1949, when Polynesians were made eligible for US naturalization and immigration. By then some couples had given up hope, legally ending the relationship by divorce. Others never divorced, keeping their married name and raising any children of the relationship as single mothers, for a married name and a wedding band moderated the stigma associated with 'abandonment' by an American husband. As one of the 'affective registers' of the expanding American empire in the Pacific, military governance of marriage demonstrates the wide reach of US law and the power of the American military authorities to regulate the private lives of its personnel extra-territorially. Using the case of one couple I look at how they negotiated the multi-layered jurisdictions of American military and legal processes, foregrounding how becoming a GI war bride was as much a legal act as it was a matter of the heart.

**Angela Wanhalla** (Department of History and Art History, University of Otago) specializes in the history of sexuality, race and colonial history. Her recent publications include, *In/visible Sight: the mixed descent families of southern New Zealand* (2009), *Early New Zealand Photography: Images and Essays* (2011) co-edited with Erika Wolf and *Matters of the Heart: A History of Interracial Marriage in New Zealand* (2013). Angela is also a member of the University of Otago's Centre for Research on Colonial Culture.

## Paerau Warbrick

### ‘Somebody looking after something for somebody else’ Māori and Trust Law in modern history

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A fundamental component in Australasian trust law is the fiduciary relationship involving a trustee, a beneficiary and property. At the very core of this relationship is the simple idea that somebody on one hand is looking after something for somebody else. In the general period of the 1950s up to the 1980s, Māori people increasingly got use to and accepted the implementation of trusts over their lands by the Māori Land Court. To date there is little written about trust structures over Māori land in modern legal history. This paper is an attempt to rectify this state of affairs by illuminating the occurrence of these trusts in the decades following the Second World War. By and large these trust structures, were successful for at least two reasons. Primarily, it was a protection mechanism for Māori that avoided large scale alienation of their lands, when other social and political factors were removing Māori from their land interests. Secondly, the fiduciary relationship sat well with old Māori world views of cultural collective sentiment not only in terms of proprietary interests but also in kinship relationships. As a particular focus, I will use the trusts in the South Island from the 1950s to the 1980s to show how Māori themselves drove the idea of trusts over their lands in order to work their lands for their own benefit. Lastly, the 1982 case of *In Re Murihiku Lands and Ngai Tahu Maori Trust Board* will be examined briefly to highlight the point of when there is a departure from the idea of ‘somebody looking after something for somebody else’.

**Dr. Paerau Warbrick** comes from a history, law and Māori Studies background. He has been a lecturer in Te Tumu: School of Māori, Pacific and Indigenous Studies at the University of Otago since 2005 where he lectures on the Treaty of Waitangi, Waitangi Tribunal and Māori customary law. Dr. Warbrick was admitted as a barrister and solicitor of the High Court of New Zealand as well as a legal practitioner of the Supreme Court of New South Wales in 2000. He also continues to practice law as a barrister where his expertise is in the work of the Māori Land Court, Māori Appellate Court and the Waitangi Tribunal. Academically he is currently working on articles and a book about the operation of the Māori Land Court in the South Island of New Zealand.



## Nicola Wheen

### From People and Environment to State: a History of Environmental Law in New Zealand

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Despite its indigenous, customary and common law beginnings, and despite the strong regional sentiments of both original and colonial settler communities here, environmental law in New Zealand quickly developed into a comprehensive statutory field of which the overall aim has been to establish “a legal and administrative order within which property rights could be allocated [and] resources could be exploited” (Ton Bührs & Robert V. Bartlett, *Environmental Policy in New Zealand: The Politics of Clean and Green?*, Oxford University Press, Auckland, 1993, p. 92). To implement this aim, the Crown progressively assumed for itself the rights to control the use, development and conservation of natural resources including land, water and fisheries. Thus, there was a shift in the locus of power in environmental management from people to the state. This shift was completed in 1987 when a new government Department was established to conserve protected areas, plants and animals with only limited public input. Although the effects of the shift were mitigated by the development of local government charged with sustainably managing natural resources through plans and consents that must be designed and applied allowing for public participation, this paper argues that New Zealand’s legal history is replete with examples that show that central government has never really lost sight of its aim to have in place a legal and administrative order that ensures that resources can be exploited and remains only too willing to use the power and control over natural resources it has in our constitutional and legal systems to intervene when development and resource exploitation are stalled by local communities and non-governmental organisations in the interests of the environment.

**Nicola Wheen** teaches Public Law, Environmental Law and International Environmental Law, and contributes to New Zealand Environmental History, at the University of Otago. Her most recent publications include "How the Law Lets Down the 'Down-Under Dolphin'" (2012) 24 *Journal of Environmental Law* 477-497, "Sex Work in New Zealand: The Re-Importation of Moral Majoritarianism in Regulating a Decriminalized Industry" (2012) 24 *Canadian Journal of Women and the Law* 414-438 (co-authored with Ceri Warnock), "The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process" in *Treaty of Waitangi Settlements* (2012, Bridget Williams Books, Wellington NZ) (the chapter was co-authored and the book co-edited with Janine Hayward), and "An Up-Dated History of New Zealand Environmental Law" in Eric Pawson and Tom Brooking, *Environmental Histories of New Zealand* (forthcoming from Otago UP, Dunedin NZ. This will be the second edition of this book, which was originally published by Oxford UP).

## David Williams

### Diverse Maori Responses to the Crown 1863-1940s

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There are two main planks to the arguments I seek to put forward. First, I will argue that, in terms of Māori/Crown relationships, 1863 was *the* year of *constitutional rupture*. Some might suggest that the passage of the New Zealand Constitution Act by the imperial Parliament in 1852 was the most significant point of disjuncture - enabling as it did the then minority of European colonists to seize state power. Others, noting the lack of clarity in the 1852 Act as to the respective powers of imperial appointees and elected settler representatives, would identify the crucial turning point in the transition to responsible government in 1856. From that point settlers did become responsible for most governmental portfolios in a Parliament representative only of propertied male colonists (except for a tiny handful of Maori male owners of fee simple property). The first Taranaki War in 1860 is often accorded symbolic significance for the rapid marginalisation of Māori within their own land that followed the military skirmishes that year. Certainly though, during the second governorship of Grey from 1861 to 1868, successive settler ministries seized effective control over the levers of power in the colony. Their policies sharply pushed Māori to the fringes in political, social, economic and cultural terms, eliminated iwi/hapū from the constitutional landscape and created just 4 Māori constituency seats in the General Assembly to represent an indigenous population that had comprised more than half of the total population until about 1860 and was still more than a third of the population. I will point to 1863 as the pivotal year in that period both to understand the constitutional rupture, and to assess the constitutional traditions that appealed to Māori in the aftermath of that rupture. The second plank in this paper's contribution to the conference theme is to draw attention to the diverse range of Māori constitutional viewpoints that emerged during and after the wars. In particular I wish to emphasise the viewpoints of those Māori – the majority of all iwi/hapū in fact – who for various reasons chose to fight alongside imperial forces and colonial militia, or chose to remain neutral during the wars. Queenite, loyal native, kupapa constitutional traditions are largely invisible in present day historical narratives. They deserve to be better known and understood.

**Dr David V Williams** holds a personal chair as Professor of Law at The University of Auckland. After study at the Victoria University of Wellington, he was a Rhodes Scholar at the University of Oxford. He has tertiary qualifications in history, law and theology including a PhD from the University of Dar es Salaam in Tanzania. He has taught at the University of Dar es Salaam and the University of Auckland. He was an independent researcher and barrister (1991-2001) specialising in legal history research relevant to Treaty of Waitangi claims. For many years he was an activist in the Citizens Association for Racial Equality (CARE). He has worked with many iwi, but especially with Ngati Whatua Orakei from the days of the Bastion Point/Takaparawhau occupation in the 1970s through to the enactment of the Ngati Whatua Orakei Treaty Settlement Act 2012. His publications include the Maori Land Legislation Manual (& database)(CFRT, 1994/1995); 'Te Kooti tango whenua': The Native Land Court 1864-1909 (Huia, 1999); Crown Policy Affecting Maori Knowledge Systems and Cultural Practices (Waitangi Tribunal, 2001); Maturanga Maori and Taonga(Waitangi Tribunal, 2001); joint editor and contributor to Waitangi Revisited: Perspectives on the Treaty of Waitangi (OUP, 2005); A simple nullity?:The Wi Parata case in New Zealand Law and History (AUP, 2011). He teaches courses in 'Law and Society' and 'Legal History', and supervises a number of PhD students. He has held visiting positions at the University of Oxford and the University of Dar es Salaam. He lives at Earthsong eco-neighbourhood in Ranui with his wife Helen McNeil.



**Seth David Young, Tiare Jade Pauli, and Isimeli David Vosa Ravia**

**Law & Justice In Indigenous Conflict Resolution Methods In The Pacific: A Comparative Analysis Of Conflict Resolution Methods In Hawaii, Samoa And Aotearoa.**

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This paper explores the paradigms of law and justice in indigenous conflict resolution methods of Samoa, Hawaii and Aotearoa, to further understand the relationship between people, power and place.

The practice of conflict resolution (“CR”) has existed in the Oceania archipelago for hundreds of years. Despite this, western societies have continued to question the legitimacy and relevance of indigenous CR methods. At the forefront of these misunderstandings is the role that law and justice have in indigenous CR methods. A comparative analysis of Samoa’s *Ifoga*, Hawaii’s *Ho’oponopono* and Aotearoa’s *Whakanoa* reveals that although these Pacific countries are culturally different, the systems of rules that govern and regulate their society (law) to maintain moral rightness (justice) are very similar.

Furthermore, this comparative analysis identifies the importance of people (*Matai* (Samoa), *Kupuna* (Hawaii) and *Rangitira* (NZ)), power (*Matai* system (Samoa), *Kapu* system (Hawaii), *Tikanga Maori* (NZ)) and place (*Malae* (Samoa), *Malae* (Hawaii), and *Marae* (NZ)) in sustaining law and justice within these indigenous societies.

**Seth David Young** is from Tucson, Arizona, USA. He is currently studying International Cultural Studies with an emphasis in International Peace building and Communications at Brigham Young University Hawaii. He has served as a Project Lead for the McKay Center for Intercultural Understanding overlooking community based projects. He is currently doing work for a Non-Profit Organization called 1000 Shillings which works with women in Uganda and Nepal to create better business opportunities for them by selling indigenous jewellery around the world.

**Tiare Jade Pauli** is from Sunshine Coast, Australia. She is currently studying International Cultural Studies with an emphasis in International Peace building and Communications while minoring in Political Science at Brigham Young University Hawaii. She has been involved in many community projects within local communities through the McKay Centre for Intercultural Understanding. She is also a cultural performer for the Aotearoa Village at the Polynesian Culture Center in Hawaii.

**Isimeli David Vosa Ravia** is from Fiji. He is currently studying Political Science and International Peace building at Brigham Young University Hawaii. He is currently working as a Field Director for the McKay Center for Intercultural Understanding overlooking community projects that promotes peace and cultural understanding.