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Abstract

This Special Issue of Law Text Culture, 'Making Law Visible: Past and Present Histories and Postcolonial Theory' originated with a one-day symposium at the University of Waikato titled 'Law, History and Postcolonial Theory and Method'. The symposium sought to recognise and stimulate multidisciplinary analyses through the lenses of postcolonial theory that made visible the operation of the law at the intersections of 'race', class and gender from colonial times to the present. The focus was on New Zealand, other white settler societies, and Pacific nations. We set out to address questions about what constitutes postcolonial research in law and history; whether specific methodological frameworks or theoretical challenges apply to this kind of work; and whether 'new' methodological or theoretical approaches have been developed and articulated. Our aims were to involve a group of people in a project that explores new methodological approaches to research around the questions we pose, and to create a multidisciplinary project across history and law that allows us to create new ways of seeing, discovering and investigating these intersections.

Writing and Praxis: Law, History and the Postcolonial

Ian Duncanson

Introduction

Writers from John Henry Newman (Newman (1871, 1891) 1996) to the recently celebrated Jacques Barzun (Barzun 1993)¹ have regarded the ideal university as an institution insulated from the pressures of day-to-day politics, a disinterested producer of ideas, embodied either in graduates or in research. To curiosity, ‘learning itself ... polite conversation and edification’ inherited from early 18th century England (Klein 1994: 13), and the defence of intellectual integrity we find in Kant (Kant (1784) in Waugh 1992, Kant (1798) 1979, Derrida 1992), Nussbaum adds intellectual and curricular innovation as the condition of tolerant education and ultimately civic virtue (Nussbaum 1997). The literature attesting to state violation of these ideals or principles in most Anglophone cultures is now vast (Duncanson 2000b). Nor has the irony always been missed, that with the collapse of the USSR and the apparent triumph of liberal values, education and other bureaucracies have assumed the practices of good old Party hacks and Soviet ideologues (Duncanson 1997a; *Australian* 12.11.2003), censoring ‘worthless’ or disloyal narratives through financial or moral pressure.² A kind of *Nomenklatura* seems in process of being fostered in Australia to attack ‘disloyal’ and trivial scholarship, one with conservative political backing — something to which I will return.

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This is my understanding of the background of our symposium.³ That it was multi-disciplinary and held in a department of law was not accidental. The regressive, even oppressive, policies that have been imposed on universities by governments using neo-classical economics as a political weapon have assimilated the idea of *vocation* to utilitarian ends. Accordingly, critical forms of legal study are subordinated even more than before to ‘professional’ (the new meaning of vocational) ends, narrow training in dogma and professional techniques; strangely, perhaps, but symptomatically, now that a lower proportion of law graduates than ever before actually become practising lawyers (Duncanson 1997b, Thornton 1998, Howe 2000).

The way forward to a progressive, broadly based, study of law lies initially, I believe, in revisiting socio-legality before widening its terms of multi-disciplinarity to include the postmodern insights of feminism and the postcolonial theory of the title of my paper. There are a couple more considerations before discussing the notion of praxis that underlies the deployment of a certain kind of history, feminism and postcolonialism. One is that the theorists of politeness and of the university cited at the beginning are sometimes misperceived — and perhaps some of them misperceive themselves — as invoking an ‘ivory tower’, politically neutral, and able somehow to arbitrate intellectual controversies objectively from beyond social struggles. Actually, of course, they were and are performing politics in their advocacy of civic improvement through education and research. Second, one has still to take seriously the jibe aimed at ‘western Marxism’ in the aftermath of the ’60s, namely that it consisted of armchair socialists, talking to no one but themselves, with deluded expectations of a campus-led revolution — campuses generally being safer than barricades (though not in many non-western parts of the world). A short answer to the jibe in its current application is that conservative politics presently fears criticism, which is why op-ed columnists on the right purport to misunderstand criticism of their views as the attempted denial of their free speech. And it is why attacks on universities and the public broadcaster in Australia by way of funding cuts and state interference — justified in

terms of the triviality, irrelevance or bias allegedly permeating those institutions, or sections of them — have escalated. An answer to the jibe that would need to be slightly longer if it had not been extensively discussed by Marxists, is that theoretical work is the putative performance of social innovation, its accompaniment as well as its possible precursor. This is perhaps a more convincing answer than it was before, now that we have abandoned the belief that social improvement can occur with a big bang instead of creeping experimentally along, requiring perpetual conversation.

Praxis

I suggested glancing back to the emergence of 20th century socio-legal studies before trying to give form to a more multi-disciplinary aspiration for the future. Willard Hurst, the pioneer of contextual and non-doctrinal legal history in the United States, made several recommendations about the disciplinary approach to look for in potential researchers in the projects for which he was so successful in gaining funding. Asked by sociologist Harry Ball about the most suitable graduates to recruit for a project to be funded by the Sage Foundation, '[Hurst] said, ignore the law review students and go after the undistinguished middle. Because, he said, they are . . . talented people who simply aren't all that motivated to be lawyers; they are interested in law, but they don't want to be lawyers, and also they don't want to be political scientists' (Garth 2000: 40). His new disciplinary enterprise was not to be carried forward by the elite, law review students with the high marks, men (for the most part) with a commitment to law as the lawyers tell them it is, but people with middling results, who are not distinguished but are nevertheless 'talented'. They are also positioned negatively between a second discipline, that of political science — 'they don't want to be political scientists'. In this middle, Hurst imagines the possibility of a synthesis, an incipient framework, as later cultural theorists would put it, potentially 'produc[ing] changes in what can be seen', where 'reconceptions of the question also change what can be represented as an answer' (Greenblatt & Gunn 1992: 4, 5). Less ambitiously but equally

importantly, perhaps, a strategic interdisciplinarity conceived by a scholarship uncommitted to the status quo may dissolve rigidities in the component disciplines themselves.

In a recent report on a leading law school, we find the middle understood this time as a conduit between the understandings of those who are or who were motivated to become practitioners of law and theoretical work in which the shape of legality and its place are discussed:

... we heard practitioners tell us that the best professional training involves a healthy respect for the theoretical literature. Similarly, it is impossible to imagine a leading academic not engaging ... in theoretical analysis ... not necessarily to become a theorist themselves [sic], but [having] an ability to engage with that literature (University of British Columbia 2003).⁴

The praxis of the title, then reminds us of the pragmatic opportunism of inter- or multi-disciplinary scholarship offered by the ‘undistinguished middle’. It reminds us, too, of the importance of scholarly amity. In the context of the law school, amid the disciplinary reproduction of authority, this means that, nevertheless, a ‘healthy respect for’ and ‘an ability to engage’ with an activity (‘the theoretical literature’) which may superficially seem — otherwise the importance of ‘theoretical literature’ in professional training could have gone without saying — tangential to the main educational game. But a concern with praxis also helps alert us to the fact that we are all theorists as well as practitioners. Legal documents, forensic routines, no less than what we might regard as philosophical speculation, are both theoretical and capable of devastating practical consequences, if we follow them unreflectingly to the outcomes they can seem to recommend or justify. Praxis involves the aspiration to moderation that preoccupied thinkers in the early 18th century. It requires a measurement of the performance end of our theoretical work and the dis-discovery of the theoretical implications of our practical activity; it is our politics and our ethics. And both ethics and politics assume an especial significance for a legal studies that follows Hurst’s anti-formalism and rejects the study of law as simply explicating the inexorable unfolding of doctrinal logic, or as necessarily the privileged meaning given to canonical texts by authorised readers. In its

interaction with history and the postcolonialism and feminism informed by postmodern anti-foundationalism, the study of legality can learn from them all as a form of praxis.

For politics and ethics are central, as we shall see, to the writing of both history and postcolonialism, and to the representation of feminist perspectives in both. Thus ‘by reclaiming the struggles of the ‘common people’ (i.e. in *The Making of the English Working Class* Thompson 1963; Hobsbawm 1974) EP Thompson’s radical populist narrative was itself part of the very tradition he sought to describe’ (Vernon 1993: 339).⁵ One can trace Thompson’s choice of salience — the working class, and the ways in which it was not made, but made itself — to his Romanticism, but there was still an ethical choice to be made as well as a politics to express. Among other feminist academics, Catherine Hall has brilliantly combined new historiography, postcolonialism and feminism in an unmatched synthesis (Hall 1992, 2000) again, combining scholarship with the politics of hearing the hitherto silenced.

Choice confronts postmodern writers in a slightly different way. Hume had already indicated the problem that postmodernism creates and confronts (Appleby et al 1996). For Humean scepticism, neither nature nor reason can provide an irrefutable basis for knowledge or action (Hume (1777) 1972: 152). In the *Treatise* ((1739) 1978), Hume illustrates the sleight of hand perpetrated by ‘vulgar morality’ when it tries to found normative principles on empirical observations:

In every system of morality which I have hitherto met, I have always remarked that the author proceeds for some time in the ordinary way of reasoning and establishes the existence of a god, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find that instead of the usual copulations of propositions *is* and *ought*, I meet with no proposition that is not connected with *ought* and *ought not*. This change is imperceptible; but it is of the last consequence. For as this *ought* and *ought not* expresses some new affirmation, ’tis necessary that it shou’d be observ’d and explain’d; and at the same time that a reason shou’d be given for what seems altogether inconceivable, how this new relation can be a deduction from the others which are entirely different from it ... [T]his

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small attention wou'd subvert all vulgar morality and let us see that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceived by reason (Hume 1978: 469–70).

Nothing follows logically from what *is*; neither what *will* come in the future, nor what *should* be done in the present.⁶ *Natural* duties of obedience are 'quietly swept away', Annette Baier writes (Baier 1994: 256) and authority comes to rest on the 'subtle invention' of government to reconcile the long term interests of all with the 'unenlightened limit ... of self-interested passion' that would plague individuals and groups without government. Two and a half centuries later, postmodernism, too, subverts the hazardous pretence that influenced post-Humean thought, that nature or reason dictate certain authorial positions. Both nature and reason were used by 18th century actors to justify the independence of the 13 colonies and the overthrow of the French *ancien régime*, but equally, both were used to explain and justify the slave regimes of some of those colonies, as well as the White Man's Burden of the 19th century empires of conquest.⁷ The responsibility for making choices concerning certain practices with foreseeable outcomes becomes much clearer when the 'vulgaries', to use Hume's term, are removed.

History

The kind of activity to which belong the practices of interrogating law from a postcolonial perspective and placing law, history and feminism in the contexts of each other have, as Terry Threadgold remarked, had a bad press in Australia, as well as attracting opprobrium from conservative governments (Threadgold 1997). In the conservative broadsheet press, vituperation against 'Mickey Mouse courses' and 'hobby subjects' stood in for arguments against the new humanities without, as Threadgold points out, any inquiry into what the new humanities were accomplishing, either by engaging undergraduates and postgraduates from non-traditional backgrounds, or by establishing Australia's international academic reputation. But the humanities had become interested in the

ways in which cultures are constituted, about dominant and marginalized cultural narratives, selves and realities. [They were] also ... about ways of re-writing or changing these dominant narratives (Threadgold 1997: 123).

— and hence unwelcome in the new climate. Unsurprisingly, the diaspora of humanities scholars from Australia following the funding cuts of the middle and late '90s — a diaspora that included Threadgold herself — was welcomed in some media. The incoming Liberal (ie, in Australia, conservative) Prime Minister promised on the night of his election in 1996, to make the 'ordinary Australian' feel 'relaxed and comfortable'. His 'ordinary' category included, time was to demonstrate, an odd collocation of millionaire radio 'personalities' and media tycoons, rich as well as poor farmers, but not artists, scholars who are proponents of critical theory or social justice, or their equally 'elite' friends in the Australian Broadcasting Corporation or the Federal Court (Duncanson 2003a).

Why is suspicion and hostility from the right toward universities, and the humanities in particular, so intense? This particular conservative era is long on morality and short on ethics, discussions about social justice and self-critical reflections on fairness of outcome. Human rights — and they have attracted particular controversy in Australia, centring on Aboriginal, women's and refugee issues — threaten existing relations of social privilege, and that same privilege is used to defend its possessors. Since the changes — however moderate — that human rights discourse recommends often conflict with justificatory narratives about how the present came to be, the terrain of contest is often history. If the natives were benighted and feeble-minded primitives, the arrival of the white man can only be considered a good thing, especially if he acted benignly in the primitives' best interest — the routine justification for colonialism. Opponents of this *Biggles in Australia* perspective figure in the speeches and writing of contemporary conservatism in Australia, as self-interested elites and (Albrechtsen 2003), 'black armband' historians (see Hall 1998, Markus 2000). Feminist arguments for better conditions for women are identified as special pleading (Johns, quoted in Duncanson 1997a: 27), as anti-relationship

and as bad for the children (Arndt, quoted in Duncanson 2001: 82, 1998: 150). These characterisations are compared, presumably, with a golden age of happy marriages, contented wives and mothers, and plentiful, well-adjusted children. Refugee rights proponents — lawyers, the United Nations, the Red Cross, Amnesty and others — threaten the nation's identity, its sovereignty, and its reputation as a humane and compassionate international good citizen — an odd interpretation of most of the country's independent history (Duncanson 2003a, 2003b).

Most of the revisionist history — it cannot fairly be described as scholarship (see the effortless demolition of Windschuttle (2002) in Manne (ed 2003)) — reflects outrage at the potential subversion of the Imaginary self that historical narratives, revealing a sexist, racist and xenophobic past and their echoes in the present, re-present.⁸ It is not a mirror stage that conservatism wishes to experience.

Hence, in a minor but disturbing register, we encounter a genre resembling that of the Holocaust-deniers. Robert Eagleston provides a concise explanation of the difference between this genre and history, in his defence of postmodernism from the charge that it undermines criticisms of writing such as that of David Irving (Eagleston 2001). In the course of developing its defence, Eagleston's text provides a possible schematisation of writing that challenges the assumptions of conventional disciplines. Cross-disciplinary work, first, as we have seen in the quotation from Greenblatt and Gunn (1992), uses conventions and procedures from plural disciplines to alter the kinds of questions that can be asked and the criteria of what can constitute answers. Second, and connectedly, there is work that pushes conventional boundaries within disciplines, altering who or what counts as objects of disciplinary attention, and who are legitimate subjects operating the disciplinary technologies. History 'from below', feminist history, critical legal and postcolonial scholarship function in part through inter- or cross-disciplinarity and in part by dis-covering the salience of people hitherto dis/uncounted: the subaltern, women, minorities of various kinds.

Holocaust denial writing constitutes a third and entirely different genre, the text argues. By misquoting or ignoring relevant documents and falsifying them, refusing physical and convergent oral testimony,

and failing to explain on what academic grounds its own interpretations of the past are preferable to those more widely accepted, Holocaust-denial fails the tests of the history and scholarly genre more widely. It is more accurately located, Eagleston suggests, in the genre of anti-Semitism. Windschuttle's work, on the evidence of the responses to it (Rundle 2003, Manne ed 2003), is less than 'very bad academic history' (James Boyce, quoted in Vincent & Land 2003: 19) but 'directed by powerful conservative agendas' (Vincent & Land, *loc cit*), a version of Holocaust-denial, albeit in a minor key.

It may, perhaps, in this Australian manifestation, represent an element of frustration at the insubordinate potential of properly historical narratives, and the desire to reinstall an Authorised Version of the national myth as one finds it in, say, Russel Ward (1958). Ward's text does not deny the callousness of white 'bushmen' (sic) to Aborigines but 'balances' the deeply immoral quality of it against the 'qualities of independence and self-sufficiency, strong sentiments of mateship and a love of freedom [that] handed down a rough-hewn but genuine and uniquely Australian heritage'.⁹

The problem with history, as E H Carr reminded us (1961, reissued with revisions 2001) long before postmodern influences on historiography, is its inevitably presentist and perspectival nature. Total recall is neither possible nor desirable. The world (and the past), in the postmodern formulation, always exceeds the facts, always requires choices to be made¹⁰ by a positioned observer, who therefore has a responsibility to reflect on what that position is and why it is being occupied. Hayden White remarks that the historian — and the noun's 'his-' should never not be scrutinised — makes his story by including some events and excluding others, by stressing some and subordinating others. The process is carried out in the interest of constituting a story of a particular kind (White 1973: 6), shaping, subordinating, and locating people and points of salience.

(At) the deep level of consciousness, a historical writer chooses conceptual strategies to explain or represent his data ... I believe the historian performs an essentially poetic act ... (White 1973: x).

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In a later work he adds,

Narrative accounts do not consist only of factual statements — singular existential propositions — and arguments; they consist as well of poetic and rhetorical elements, by which what would otherwise be a list is transformed into a story (White 1999).

The emphasis on poetics, on the story component of history, comes about because of the present absence of the past. What Keith Jenkins calls ‘lower case’ history, or history allegedly ‘for its own sake’ (as opposed to the ‘upper case’ history of the Whig tradition, or of Hegel or Marx), in which the past apparently ‘speaks for itself’ overlooks the permanent controversy and contestation that characterise and motivate historical writing, and which arise from the inevitable representation that history is (Jenkins 1997). Exasperated by an argument between two people ahead of him in a cinema queue about what Marshall McLuhan *really* meant, in Woody Allen’s film *Annie Hall*, the character played by Allen fantastically summons McLuhan to the queue, where he explains that they are both wrong. Unlike Allen, clearly, the historian cannot up ‘the past’; but in disguising representation as, instead, *referencing* the past as Truth, Jenkins’ lower case historians elide their own positioned presence in their texts. Ideologically, Jenkins argues that while criticising ‘presentist’ historiography of the Marxist kind, which interprets the past as the means of furthering a present and future politics, ‘history for its own sake’ serves the presentist task of preserving the status quo:

The fact that the bourgeoisie doesn’t want a different future (it has arrived at its preferred historical destination) means that it doesn’t need a past-based, future-oriented fabrication (Jenkins 1997: 15).

Judicial historiography has been wilfully blind to the developments in the history of society that Hobsbawm (1974) summarised, leading to serious injustice. As Sharp put it, the business of listening to the unauthorised speaking about themselves —

History from below helps convince those of us born without a silver spoon in our mouths that we have a past, that we come from somewhere ... it will

also play an important part in helping to correct and amplify that mainstream history that is still the accepted canon in British historical studies (Sharp 1993: 38).

— also renders the invisible visible by tracing the responsive behavioural patterns of their masters (Morall 1970, Wolfe 1982).¹¹ In the Yorta Yorta land rights claim, the Australian courts, from Olney J to the High Court, gave greater weight to the impressions written in the diaries of a mid-19th century white squatter than to the oral testimony of the Yorta Yorta people claiming continuing connection with their country. Yet another culture was by this means erased by the infamous ‘tides of history’ — and tides as we know from the tale of King Cnut, respond to no one and are the responsibility of no one.

Judicial history seems often a history of convenience, if we recall the remark attributed to Lord Denning concerning the Irishmen convicted of terrorism, on evidence later demonstrated to be misleading. All the fuss and expense would have been spared, the former Master of the Rolls is quoted as saying, had the death penalty not been abolished (*The Spectator* 18 August 1990: 10). Better unevidenced history than a lot of fuss and bother and discredit to the legal system. More locally, we find Brennan J excusing the removal of Aboriginal children from their families in the relatively recent past on the ground that the ‘Protector’ of Aborigines exercised his discretion to do so ‘reasonably’ according to community standards of the time (*Kruger v Commonwealth*). Brennan J felt no need to refer to the evidence for this, or to wonder if community standards were based on reliable information about the practice of removal. And, once again, since Aborigines did not find the practice of losing their children reasonable, they were in the judgment erased from the community whose standards of reasonableness are the measure of what is reasonable. In the same sadly unremarkable case, Dawson J denied that the plaintiffs’ human rights had been violated by the practice of child-theft, since the Australian constitution provides no human rights: the founders, Dawson J believed, had preferred to leave those to the democratic process. As we know from the debates however, the founders eschewed entrenched rights in order to deny equality to the

Chinese and launch the White Australia policy. Dawson went on to affirm the propriety, from a constitutional point of view, of any legislation enacting genocide. It seems that the Convention debates about the constitution and the Genocide Convention, to which Australia is a signatory, are further victims of the tides of judicial history (Duncanson 2000b: 295–6).¹²

Postcolonialism

Postcolonial work has been, at least since Said (Said 1978, 1993, Young 2001) a form of revisionist history that has not concerned itself solely with the effects and elisions associated with former colonies, but also with the consequences of colonialism on colonising powers themselves (Foucault 2003: 103). It resembles recent feminism, too, in its approach to the subject and agency. Of Subaltern Studies, for example, Gayatri Spivak wrote, ‘its theoretical relationship to feminism is that the subaltern is gendered and hence needs to be studied with the help of feminist theory’ (Spivak 2000: 324). The popular conception of feminism’s central concern, the social inequalities of women to men, turns out to be more complicated, as John Stuart Mill and Harriet Taylor had foreshadowed in the discussion of the supposed natural inferiority of women to men (Taylor Mill (1851), Mill (1869) in Rossi 1970). The proper subject of feminism, de Lauretis argues, is not Woman or women, but a ‘theoretical construct (a way of conceptualising, of understanding, of accounting for certain *processes*, not women) (1987: 10). As theorised subjects Woman/women leave no space for questions about other intersecting, subject-ing technologies such as ethnicity, class, sexuality. So, criticising the ‘transparency’ or elided positionality of the author who speaks of woman in the context of a text entitled *New French Feminisms*, Spivak writes, ‘the most accessible strand of French feminism is governed by the philosophy that argues the impossibility of answering such ... question(s)’ (1988: 141). The technologies to which de Lauretis refers are ‘systems of representation’ with material effect, ‘sociocultural practices, discourses and institutions devoted to the production of men and women’ (de Lauretis 1987: 19) from film and the print media through education and law.

Confronting the question of how the subject becomes who s/he is supposed to be, de Lauretis invokes Althusser's discussion of interpellation. Ideology 'recruits subjects among individuals by ... hailing, which can be imagined along the lines of the most common everyday police ... hailing, "Hey, you there"' (Althusser 1971: 163). De Lauretis adds, 'the construction of gender is the product and the process of both representation and *self-representation*'. De Lauretis modifies the determinism that notoriously characterises Althusser's structuralist Marxism, opening the possibility of agency in a less deterministic way:

To assert that the social representation of gender affects its subjective construction and that, vice versa, the subjective representation of gender — or self-representation — affects its social construction leaves open the possibility of agency and self-determination at the subjective, even individual level of micropolitical practices which Althusser himself would clearly disclaim (1987: 9).

In this anti-essentialist argument, gendering organises practices, social positioning and the world in general, in such ways that subjects are invited to recognise and/or identify with as masculine or feminine. Objects such as clothes and cars, and practices such as consuming (feminine) and producing (masculine) are frequently gendered (de Grazia & Furlough 1996). Obviously the objects will often have no correspondence with biological men and women, but they help produce and reproduce relations of dominance and subordination. Women not infrequently occupy sites of power in patriarchal social orders but, as Berns suggests in her discussion of adjudicating (Berns 1998) the site is itself a masculine one. Men in positions of power may feminise other men, through rape in de Lauretis's example, or as part of the practice of colonialism (Sinha 1995). However, caution is necessary when discussing feminised men, not to provide a stalking horse for what Tania Modleski refers to in the title of her book, *Feminism without Women* (Modleski 1991). Theorising women's experiences of exploitation is what provides feminism with its progressive politics.¹³ The anatomical penis and the symbolic phallus are not synonymous (Silverman 1983), although the experience of this aporia can often provoke an hysterical ferocity when the symbolically castrated encounter those with still less power.

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Postcolonial writing, coming after negritude, anti-colonial nationalism and the neo-colonial disappointment that has attended formal independence, has also tried to avoid essentialisms — in this case those of returning to an imagined pre-colonial authenticity; or of assuming the subjectivity generated by the institutions of the former imperial power (Guha 1988). The aim has been to destabilise the signs that legitimate a conventional reading of the colonial text, to upset colonial historiography. In this way E P Thompson upset the English history of ‘the mob’, which denied rationality to 18th century protesters, with his introduction of the moral economy of his re-named ‘crowd’ (Thompson 1991). Insurgency can then be read through what Spivak has called the subject-effect:

The subject-effect can ... be plotted as part of an immense, discontinuous network of strands that may be termed politics, ideology, economics, history, sexuality, language ... and so on ... Different knottings and configurations of those strands, themselves dependent on myriad circumstances, produce the effect of an operating subject (Spivak 1988).

The purpose is at one level the satisfaction of scholarly curiosity, to see how differently things can be thought and with what intellectual consequences: to make familiar things strange, as Foucault put it. At another not unconnected level, the purpose is to engage in cultural struggle as a means eventually to accomplish broader social change. Marxism, feminism and the new humanities generally constitute scholarly struggles to secure the re-cognition of the mainstream, to make silenced voices audible.

Postcolonial critique marks the moment where the political and cultural experience of the marginalized periphery developed into a more general theoretical position that could be set against western political, cultural and academic hegemony and its protocols of knowledge.

For the first time the power of the western academy has been deployed against the west (Young 2001).

Here we have another context in which to understand both the reluctance in the west to fund higher education except for narrowly

utilitarian purposes; and the complaint of falling standards (Duncanson 2000a). It is also a useful context in which to understand the chain-of-command form of management, often draconian disciplinary controls and the loss of academic freedom (Thornton 2003) in universities.

Law in jurisprudence after the Bengal Settlement

The body of the law is a white man's body (Duncanson 2000b, 2003). Law has also been, historically, a white coloniser's body. By the 1870s, Sir James Fitzjames Stephen was able to term the law that the imperial administrators took with them to India, the 'gospel of the English ... a compulsory gospel which admits of no dissent and no disobedience' (Cocks 1988: 87). This gospel was not preached unaccompanied, either in India, or later in the metropole, which should warn us against too narrow a study of how the law aspires to work. Chris Baldick quotes a university extension lecturer, writing in 1891:

The People need political culture, instruction, that is to say, in what pertains to their relation to the state, to their duties as citizens; and they need also to be impressed sentimentally by having the presentation in legend and history of heroic and patriotic example brought vividly before them (Baldick 1983: 64).

This paints in somewhat softer tones the stark picture offered by Matthew Arnold in 1869, of the anarchy likely to ensue once the working class gained power through the vote, if the critic did not first produce a culture by which that class might be policed and diverted from its undisciplined 'likes': 'bawling, hustling and smashing (and) beer' (Arnold (1869) 1994: 72). Twenty years earlier, Thomas Babbington Macaulay was urging some state expenditure on education as a condition of civic peace among the English working class (Macaulay (1848) in Ellis, ed 1889: 734), having in 1835 already persuaded the Supreme Council of India (of which he was, significantly, the legal member) that effective government of the natives in India required their instruction in English in what he had described before his appointment as 'the

imperishable empire of our arts, our morals, our literature and our laws' (Macaulay (1833) in Ellis, ed 1889: 572).

The assimilation of inferiors (natives, women, labourers) to the virtuous traditions of their betters, through culture and eventually the systematic transmission of the cultural heritage through the technology of education represented a departure in ideas about state formation (Lloyd & Thomas 1998). It seems to have begun in India (Viswathan 1998, Pennycook 1998). And at about the same time, there is a curious development of legislative social engineering.¹⁴ The Permanent Settlement of land in Bengal was an attempt there to reproduce the English regime of agrarian capitalism, in formal terms in England an artefact of the legal system — of the trust, the mortgage, Hardwicke's Marriage Act and the caring attentions of the English judiciary (Sugarman 1995).

Actually, English agrarian capitalism was based on feudalism inflected through the Glorious Revolution of 1688/9.¹⁵ All land was owned by the Crown — the connection of sovereignty and ownership that wrought the dispossession of indigenous Australia — but the monarch's right to interfere with those who held land of him was restrained by their rights under common law and equity, and by the control exercised by Parliament over taxation, including that of land, which lent some predictability to the landholders' liability. According to conventional wisdom, security of tenure and the control over tax that generated predictability were the basis of the landholder's confidence that he could invest in his property — become an improving landlord. Bengali zemindars were to be turned by the regime that finally came into existence in 1793 into improving landlords, by security of tenure and a fixed limit on the revenues they were bound to pay the East India Company. As grateful landlords, they would cease to exploit their tenants and the consequently greater prosperity and safety would cement ties between the Company and the ruled.

The Bengal Settlement is a point of transition in the conception of law. It is considered by the British analogous with a transformed feudalism, itself associated in the minds of Britain's rulers with the slowly adapting customs of a community;¹⁶ yet it is imposed, in less than 20

years, from outside the community, by an *alien* community. And legitimating the Settlement is a newly unrestrained application of sovereign government. Where was the legal power to alter the zemindars' status?

The political solution (Alexander Dow, a contemporary writer) puts forward is that the ... Company should assume full powers without further delay ... Dow's emphasis on the 'right of arms' indicates how by 1772 there had already emerged a new school of thought trying to resolve the knotty problem of the Company's status in the light of a powerful political concept inherited from Hobbes — that is, of sovereignty acquired by force. In the same year, too, Warren Hastings characterized 'the sword which gave us the dominion of Bengal' as 'a natural charter' (Guha 1981: 32–3).

I have suggested that the basis on which legal authority was considered to rest in colonial India was beginning to change during the 18th century. In the next section, I want to suggest that the change was imported into Britain, in line with Foucault's remark, quoted earlier, that regulatory mechanisms designed for colonial purposes 'boomerang' to become a form of domestic colonialism; or, as Pennycook puts it, 'colonialism needs to be seen as a primary site of cultural production whose products have flowed back through the imperial system' (Pennycook 1998: 35).

Understanding law

According to Edmund Burke, lawyers' expositions of law themselves miss its 'grandeur':

They present jurisprudence in barbarous terms, ill-explained, a coarse but not a plain expression, an ill-digested method, a species of reasoning the very refuse of the schools (Burke, in Cone 1957: 16).

Boswell quotes Burke's opinion that instruction about law 'placed too much emphasis on forms and procedures and taught the students little about principles. And produced only narrow and contracted notions' of law (Cone 1957: 16). In his account of Matthew Hale's *History of the Common Law in England*, Burke condemns both 'the persuasion hardly to be eradicated in the minds of lawyers' that English law has not

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changed significantly during its existence ‘time out of mind’, and the conceit that English law is an entirely indigenous product, free of foreign influences. Such a-historic illusions, he asserts, are maintained at the cost of distorting understandings of the past, the ‘torture (of) ancient monuments’. Clearly influenced by the political economists — his remark, ‘when we affect to pity, as poor, those who must labor, or the world cannot exist, we trifle with the condition of mankind’ (Burke (1797) in Winch 1996: 198), aligns him with writers like Malthus — he nevertheless distanced himself from what he considered Tory beliefs.

Burke summarizes a basic difference between the Tories, who held that laws were a grant from, and revocable by, the monarch, and the Whigs, who argued that the laws were the product of the people’s insistence that their liberties be protected from the arbitrary power of the King (McLoughlin & Boulton 1997: 280, Hallam (1827) 2 vols in 1, n.d.: 740).

During the debates on Hastings’ impeachment, in an echo of Blackstone’s far from throwaway reference to natural law, Burke invokes ‘the Law which governs all law’ and warns the Commons that ‘any man who quotes as precedents the abuses of tyrants and robbers endeavors to violate the very foundations of justice and to put an end to law’ (Marshall 1997: 280). This law above law is not a transcendent set of norms accessible to pure or speculative reason, a technology Burke vigorously rejected in his attacks on the French Revolution.¹⁷

The social paradigm within which Burke was operating was one of manners and politeness, a product of the anxious determination of the 18th century ruling classes to avoid what it perceived to have been the chaos wrought by excess zeal and ‘enthusiasm’, the clash of incommensurate religious and political Truths of the revolutionary era. Lord Chesterfield’s letters to his son perhaps caricature the extent to which agreement about the steps of the social minuet exceeds in importance their nature and direction (Chesterfield (1739–65, 1774) 1929). However, according to Postema (1986: 109), for Hume, so important an ideal as justice ‘conceptually presupposes a convention established in and generally accepted by the community’. ‘The accent on refinement’, Porter writes,

was no footling obsession with petty punctilio; it was a desperate remedy to heal the conflict and personal traumas stemming from civil and domestic tyranny and topsy-turvy social values (Porter 2000: 22).

Authority should do what is best according to the conventions of the age and at the same time be based on what is established, according to Hume (Postema 1986: 90). The duty of the King in Parliament, wrote Burke to the Sheriffs of Bristol, objecting to British policy on America, was

in effect to follow, not to force, the public inclination — to give a direction, a form, a technical dress and a specific sanction to the general sense of the community, [that] is the true end of legislature (Stanlis 1963: 240).

One of Burke's concerns about the Company's government in India was the precedent it might set for the subversion of constitutional traditions in England — as moral example, and also more materially as a source of corruption at home once the sums generated by Company rapacity were applied to buying votes. His principle, we have seen, was that a people ought to be governed according to the traditions of that people. Hastings, according to Burke, claimed that he found only slaves of despotism in India, and merely maintained them in the condition in which he found them. 'That the people of Asia have no laws, rights or liberty is a doctrine that is wickedly to be disseminated in this country', but is not true, Burke said (Stanlis 1963). Oriental authority is based on customs and principles and the subjects of that authority are entitled to the rights conferred upon them by those customs and principles, whether their current ruler was established by descent or by conquest (Stanlis 1963: 475 et seq).

There was, of course, support for Burke's position in Blackstone. In volume 1 of the *Commentaries*, the sovereign nature of the King in Parliament is acknowledged, but qualified in terms of its dual function as executive — the King and the ministers chosen by him — and its tripartite nature as legislature — King, Lords and the representatives of the Commons. The qualification was by no means anachronistic in the 18th century for, as Asa Briggs shows in relation to the Pitt Administration, while the legislature might deny a majority to the King's ministers,

and the ministers themselves manipulate and resist the King, every administration until after that of Lord Liverpool required the confidence of the King (Briggs 1997, chs II, IV). In Cookson's words:

A great number of Parliament men, possibly a majority would have been prepared to argue (in 1812) that it was unconstitutional to force a policy or any action against the wishes of the King, and that he was entitled to dismiss them if there was a loss of confidence to this extent (1975: 5).

Blackstone deals with the basis of common law and Parliamentary authority in his discussion of the right to resistance to them, entertained by 'Mr. Locke', and still controversial. There is, he is certain, no such right: '*So long, therefore, as the English constitution lasts we may venture to affirm that the power of parliament is absolute and without control*' (Blackstone 1765, I: 157, emphasis mine). 'The supreme and absolute authority of the state,' he writes, '*is vested by our constitution in parliament*' (143, my emphasis).¹⁸

If we were to ask whose account of 'our constitution' to consult in order to discover whether a right to resistance had arisen or not, Blackstone's answer, having famously celebrated the oracular status of the judges of common law and equity, would no doubt have been, his account or that of his fellows. Likewise, Burke's own sense rather than that of his social inferiors, would form the guide to the present state of the evolving customs of the people. As he put it,

I cannot indeed take it upon myself to say that I have the honor to *follow* the sense of the people. The truth is, *I met it on the way* while I was pursuing their interest according to my own ideas (White 1959: 109).

Of Hume, Blackstone and Burke, none was, of course, a democrat, although their ideas can lend themselves to an argument for greater political participation by the people — or a broader view of who 'the people' are. If part of the search for law involves a search for the habits and dispositions of a particular community, this limits the abstraction and remoteness that characterise later legal theory narratives and at least permits the scholar and the administrator to listen out for silenced voices in the manner we have discussed. Liberal legal theorist, Ronald

Dworkin — described by Neil MacCormick as a pre-Benthamite (MacCormick 1984) — makes use of the Burkean model of legality. But if the authorised reader of community traditions is, for Burke a first-generation-Protestant Irishman consciousness, the upper class Englishman of his fantasies (Paulin 1998), Dworkin's reader is the still more fantastical figure, Judge Hercules the omniscient.

Re-understanding law as the colonising of philosophies, histories and sociologies

The Hobbesian view of law and sovereignty, which Guha detects in the Company's India, returned to its home at the prompting of Jeremy Bentham. Although his writing on law is in conscious opposition to Blackstone, his much sharper and more abstract sovereign must nevertheless have a source, or mandate which constitutes a limit (Bentham (1776) 1988: 101, (1782, unpublished) 1970: 64). It is worth quoting Postema at length. For Bentham:

The force and authority of law depend on a general disposition of the population to obey. But that disposition is matched by dispositions on the part of the rulers and lawmakers. The disposition rests on an intersecting network of mutual expectations among subjects and between the sovereign and the subjects collectively. These expectations ... take on the character of custom or practice ... [T]he custom has a precise focus. It is concerned with the conditions laws must meet if they are to count as laws ... [and] is capable of explicit formulation, modification and limitation (Postema 1986: 255).

As the title of his manuscript — unpublished until much later — makes clear, however, Bentham did consider it fruitful to contemplate legality in abstraction from any particular community: *Of Laws in General*.

Bentham is an ambiguous figure in any discussion of imperial authority, if we think of imperial here as encompassing the various ways of understanding political independence.¹⁹ Like Hume and Adam Smith, he was opposed to the practice of colonialism, declaring in a

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pamphlet addressed to the French Assembly about the Republic's colonies, 'You choose your own government. Why are not other people to choose theirs?' (Young 2001: 86). On the other hand, he 'had always been eager to take a hand in framing the law system in British India. In 1793 he had made an offer of his services as a sort of Indian Solon'. Stokes quotes Bentinck, farewelling his friends before leaving to become Governor-General, saying to Bentham, 'I am going to India, but ... it is you who will be Governor-General' (Stokes 1959: 51). Bentham, too was drawn to absolutist government as the best means of implementing his social engineering schemes, while maintaining that rulers were the servants of the state (Rosenblum 1978: ch 4).

At the beginning of the *Fragment*, Bentham compares his work of demystifying the law and setting morality on a rigorous and objective foundation — as he saw it — of utility to the work of the explorers venturing into 'the most distant and recondite regions of the earth' (Bentham 1988: 3). A half century later, his part-follower, John Austin, also saw himself in the cartography business, providing a map that would enable the student to navigate the bewildering terrain of the law. The task of jurisprudence was to chart the apparently chaotic trails that ran across this terrain, and therefore an early undertaking was to define the topography and the boundaries of 'law properly so-called', as distinct from the neighbouring regions of Divine law, custom, morality or etiquette (Austin (1832) 1995). There is a good deal in Austin of Bentham's account of law as

assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed by a certain person or class of persons who are supposed to be subject to his power (Bentham 1970: 1).²⁰

In Austin, too, there is a conviction that 'law' can usefully be discussed and laws recommended, in the abstract. What is missing is the concept of a mandate, which for Bentham characterises and limits, while not being part of, the law itself. The Austinian sovereign has become the political superior with no habit of obedience to any other person or body of persons, issuing general commands backed by threats, to

political inferiors. This sovereign is limited only by practical calculations of its capacity to enforce its will. Politically embodied in the Westminster parliament after mid-century, it became conceptually subject only to Dicey's feeble and disappointed hope that Parliamentarians would behave like decent Englishmen. Austin, as we know, came to regret his model as possibly endorsing a tyranny of an (undesirable) majority, if the working class and women were enfranchised and came to control his sovereign. Legal authority has, he wrote after 1849 (having witnessed rampaging Chartist and heard of the European revolutions)

arisen insensibly from past states of the country, and has been adapted insensibly to its present situation. There are, moreover, important parts of the system which have arisen from usage and not from positive institutions.

He also said that the 'object of loyalty by the British people was not "a constitution of recent origin, but one which has descended to them from previous generations"' (quoted in Hamburger & Hamburger 1985: 190). Dicey retained the Austinian sovereign after Austin had fearfully abandoned it, consoling himself with Leslie Stephen's assurance that legal omnipotence would in England be used in a common sense way, adding for his own part that just as the kinds of men who became Popes were unlikely to be revolutionaries, so parliamentarians could be trusted to act in a manner acceptable to the subjects of their governance (Dicey 1886: 74–5). Heuston drily observed that Dicey's conviction that 'parliament would not enact legislation utterly at variance with the decent feelings of Englishmen of the upper middle class' disintegrated when confronted with potential Irish Home Rule legislation. Moreover, Heuston added, Dicey's reconciliation of parliamentary omnipotence with the restraints implied by his 'rule of law' was 'tortured' (Heuston 1964: 2).

Nonetheless, David Sugarman writes that 'the black letter tradition continues to overshadow the way we teach, write and think about law', apparently lending substance to the assumption that 'the law is an internally coherent and unified body of rules' beyond which the legal technician need inquire only if so inclined (Sugarman 1991: 34). But worse than its claims to disciplinary self-sufficiency is the imperialist

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gesture, in an ironic reversal of Kant's *Conflict of the Faculties*, in which the law discipline has colonised corners of other disciplines such as history, sociology and philosophy and put them to work on the already-law imposed on them by what we call the law school.

Primitive law, or, fatally for Aborigines in what whites called New South Wales, a white fantasy of no law at all, has featured in the shadow of 'real law' in legal history and anthropology, making a brief appearance, late in the day, only to be washed away in the tides, as we have seen, of judicial historiography, insulated from racism by 'regret' (Grbich 2001). In his account of Bentham, philosopher Ross Harrison repeats another legal alibi for justice, which we find everywhere in Enlightenment thought, from Beccaria to Berlin (Duncanson & Kerruish 1986: 16–8):

In positive law, my rights are not identified with legal opportunities to promote actions, that is, to exercise my will in bringing a case against someone (Harrison 1983: 96).

The example he gives of where the idea of my having a right is not contradicted by my incapacity to vindicate it in the relevant legal system, is an interesting symptom of the colonisation of philosophy by the law discipline. The absence of law from the scene of rights-enforcement is excused by a theoretical simulacrum, a mute advocate on the plaintiff's side worthy of the legal fictions against which Bentham fulminated. Harrison illustrates his assertion with a quotation from Lord Diplock, explaining the 'elementary' proposition that diplomatic immunity is not immunity from liability, but merely from suit. It is a nice, sanitary, description of civilised diplomacy. The law recognises the legal wrong, but waives the — assumed here — usual entailment of remedy in a gesture inviting reciprocity, smoothing international relations.

But if we think, say of events in Ceduna, South Australia, as depicted in Craig Lahiff's recent film about a legal case in 1950s South Australia, *Black and White*, what is the *point* in asserting that the right of the film's Aboriginal defendant, Max Stuart, to a fair trial, his right not to be imprisoned for a murder he did not commit, remains in existence even though the legal system, from the state courts in Adelaide to the Privy Council in London, failed to honour it? What kind of representation of

law is this, what are the politics of it, who benefits, and who loses? As the contributors to *Deposing Sovereignty After Mabo* (Motha 2002) point out, the High Court's insistence in that case, that the common law, after all, does recognise indigenous land ownership is in-deed, after all — after all the dispossession and after all the prior legitimacy of the coloniser's law on which the re-cognition is said to rest. The heirs of long dead expropriated ancestors find themselves with dead rights. The legal system did not hear stories of legal wrongs until they were long past and dead wrongs.

Legal subjectivity

Law, the discipline, as it has emerged after Austin, does not position us as legal subjects. We know better than to suppose that the doctrine of the legal texts gives an account of what we can do. The law discipline, as it informs the media columns, the tropes of speech writers and the assumptions of political science rather, produces us as subject-effects of a politics that compels us to recognise unenforceable 'rights' where there would otherwise be nothing to see but exploitation.

Like the colonial power that serendipitously nurtured it, the law discipline dis-appears manufactured inequality into the experience of personal inadequacy (Nandy 1983). Or the discipline re-writes the effects of the law machine as accidental, a kind of pilot error. The areas of the humanities I have discussed above may offer a way forward, if we think, for example, of Spivak's concept of the subject-effect. The law, as we have been invited to understand it and ourselves in relation to it, produces us as subject-effects, but diminished, humans interpellated from the juridical site, much as Althusserian subjects are interpellated by the police, 'Hey, you', which finds us one-dimensional, with feelings of guilt. But this process can be opened up along the lines indicated by de Lauretis. If the subject of law is not only represented by law, but allows itself to see itself as affecting the law by self-representing its legal subjecthood, 'the text', as Barthes puts it, 'can be read without its father's guarantee' (Barthes 1988: 61). A liberating study of law requires more than the orthodoxies of Victorian jurisprudence.

Notes

- 1 I am assuming that the publication of a Reader of one's works constitutes a celebration. Barzun (1993: 217) distinguishes ideas from handicrafts in a way that speaks to those who share faculty space with those who help to award degrees in ski resort or golf course management: 'You can forget the details of history or chemistry and have gained immense profit from learning them, because by learning them you have become a different being; but forget the details of real estate management or ice cream making and you have nothing'. Barzun is criticised comprehensively in Readings 1996: 7 et seq.
- 2 Cultural Studies is obviously a target in Australia, in language clearly borrowed from the US 'culture wars'. Current university 'reform' proposals before the Australian Senate (November 2003) would permit the Minister discretion to defund courses s/he disapproved, rendering them full fee-paying, thus unviable. Of course, universities would be free to offer them, and students to take them, just as rich and poor are equally free to stay at the Sheraton. In an interview in the *Australian*, 12.11.2003, the Vice Chancellor of Melbourne University revealed that he had on a number of occasions been asked by the federal education department to discipline or restrain academics 'from doing what they were doing' or 'the university would suffer'.
- 3 This article is based on a paper presented to the Law, History, Praxis and Postcolonial Theory Symposium, at Waikato University, New Zealand. The topic was suggested by Nan Seuffert, and I am grateful for her organisational and intellectual contribution to others', as well as my efforts. Judith Grbich's comments were, as always, invaluable.
- 4 I am grateful to Wes Pue for the reference.
- 5 Thompson was, of course, influenced by the cultural studies of Richard Hoggart and Raymond Williams, who spent much of their careers teaching extension courses, largely for working class men (Inglis 1995).
- 6 Thus 'the bread that I formerly eat nourish'd me ... but does it follow that other bread must nourish me at another time?' (Hume 1978: 34).
- 7 Kipling's 1899 poem of that name was a celebration of the US occupation of the Philippines, a process which left 220 000 Filipinos dead (Allman 1985: 326).

- 8 Australia is not remarkable in these qualities, although it is possible that mainstream commentators in some countries are more comfortable with admitting their shortcomings.
- 9 This is drawn, not from the author, but from the summary on the back of the 1970 OUP paperback.
- 10 Ironically, of course, the corporatist mantra of freedom of choice accompanies precisely a canalisation and ultimately a closure of choice.
- 11 European feudalism was not simply imposed on an inert peasantry, but was in part a response to the ever-present threat of revolt by those from whom we seldom hear.
- 12 Manne (2001) discusses the re-writing of history by defence counsel for the federal government in a later case in which plaintiffs sought compensation for injuries suffered after their removal from their families: *Cubillo v Commonwealth*.
- 13 For the same reason, while renaming women's studies as gender studies has an intellectual appeal, the political implications are not attractive.
- 14 Lieberman 1989, notes a rise in the quantity of British legislative activity in the 18th century. How much was public in the modern sense depends upon how one classifies it (see English & Saville 1983: 50, who cite 9556 public and 18 497 private Acts of Parliament as late as between 1800–1884).
- 15 Guha 1981: Preface, notes one of the many bizarre aspects of the project as Francis, a Physiocrat and an admirer of the French Revolution trying to recreate a kind of feudalism in late 18th century Bengal.
- 16 The idea of the British constitution, the legitimating basis of law, as itself resting on a quasi-organic social hierarchy is associated particularly with Burke, although Francis, one of the Settlement's architects, fell out with Burke because of the latter's resistance to the possibility of creating such a hierarchy — which is what the Settlement was meant to accomplish. But, of course, as Burke made clear in his speeches during the impeachment of Hastings, he believed in the application of the *principles* of the constitution — ie, that law in Bengal should accord with Bengali customs and expectations — not the application of English law to a foreign land.
- 17 The revolutionary constitution of government based on theories, whose public benefit is measured by arithmetic, geometry and theodolites is contrasted with the incremental nature of constituting authority in England,

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- where the evaluation of change is in terms of its effects (Burke (1790) 1910).
- 18 Heuston (1964: 2) writes: ‘Blackstone was obliged to express doubts concerning the effects of statutes contrary to the law of God, or “impossible to be performed”, or with “absurd consequences quite manifestly contrary to common reason”, and reprobated those who spoke of the “omnipotence of parliament” for using “a figure rather too bold”’.
 - 19 Canny (1998) points out that England was described as an empire since the reformation.
 - 20 Their prose styles exhibit a similar turgidity, too.

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