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VARIETIES OF HISTORY AND THE LAW

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Thank you for your kind invitation to speak at lunch today. Advocates would generally agree that history can illuminate some aspects of the law. In that context I wanted to say something about differing historical methods but, before doing that, let me acknowledge the importance of history, by which I mean the past, in many legal settings.

The Law and the Past

There are crucial legal expressions such as "trial by jury" which have their own history. In Australia, the history of that expression is central to the understanding and application of it particularly as s 80 of the Australian Constitution contains the protection: "trial on indictment of any offence against any law of the

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[+] Justice of the High Court of Australia. This speech was given in an abbreviated form.

Commonwealth shall be by jury ..." The jurisprudence on that section has commonly considered what the expression "trial by jury" meant in the early 20th century[1]: plainly, an historical inquiry.

It has been accepted for some time now, both in judicial approaches and in the direction given by statutes dealing with interpretation, that the task of statutory construction is one in which extrinsic and historical materials may be taken into account - in other words the history of the statute can be relevant to its construction: again, an historical inquiry may be made as part of the curial process.

The tort of negligence with its focus on causation is concerned with the history of an event or conduct said to have occasioned damage. The criminal law is also concerned with the past and in particular with whether the event or conduct alleged in charges occurred as particularised. Once more, an historical inquiry forms part of the curial process.

Peculiar difficulties arise where a court relies on historians as expert witnesses. In the Australian context, we have seen this in connection with the cases on Aboriginal land rights. Whilst a statutory framework has been enacted after the two principal cases of Mabo[2] and Wik[3], in those cases, which were to some extent reflected in the legislation, the courts perforce relied upon historical material.

Subsequently, there has been some debate about the correctness of the historical information on which the court acted. In one

sense, that problem might be said to arise in the evidence of expert witnesses generally, but it is plainly undesirable that courts should be drawn into what are sometimes called culture wars about highly contested and freighted periods in our history.

Another example might be noted. That is the step which must be taken in Aboriginal land claim cases in which an uninterrupted connection with the land by the claimants must be demonstrated. Such cases test the old notions of admissibility to their limits, and may seem to place the courts in the position, not just of weighing the evidence of competing expert witnesses, but of writing history. However, an historical inquiry must be made. As these examples suggest, the law, as a matter of course, finds itself concerned with history because legal cases involve judgements on past events.

Legal Method and Historical Method

In considering those examples of the relevance of the past to the law, it is essential to observe that legal method differs from historical method in at least in one key respect. When a court is considering a legal question involving past events and conduct the question is framed and limited by the law whereas an historical enquiry has a broader sweep. Putting it another way, an historian is always concerned with weight, but only rarely with admissibility. As a late Chief Justice of the High Court of Australia, Sir Owen Dixon, observed of the legal system:

> "[It] would seem to assume always that the course of human affairs is discoverable, that there is time and opportunity for inquiry, that the connexion of events or causes can be ascertained[4]."

But he went on to say:

> "The courts in their way seek truth only upon some narrow or restricted question defined in advance by the law[5]."

Elsewhere, Sir Owen Dixon recognised that it may be said that under the maxim *res iudicata pro veritate accipitur* (a thing adjudicated is accepted as the truth) courts have an advantage over other seekers after truth[6]. The philosopher of history, R.G. Collingwood, spoke of history in a similar vein when he described history as a search for truth. He conceived of history as living on in the present and said in his autobiography: "[T]he historian may very well be related to the non-historian as a trained woodsman is to the ignorant traveller"[7].

The legal search for truth is circumscribed by the limitations upon courts which I have described. Judges only have authority to decide justiciable issues within the framework of the facts of any individual case. When comparing lawyers and historians, F.W. Maitland said:

> "The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me to be a contradiction in terms[8]."

Varieties of History

To illustrate the varieties of history let me put before you briefly some various answers to be found to the question "What is history" so as to understand the differing uses to which history is put and to understand some of the different methods by which

history is practised. In this context I now mean by history the study of the past. From that vantage point I then want to consider two examples of the specific contributions made by history to understanding the law.

Denis Diderot, the principal director of the French Encyclopédie published between 1751 and 1776, captured the Enlightenment approach to history when he said:

> "All things must be examined, all must be winnowed and sifted without exception and without sparing anyone's sensibilities[9].

It has been said that Enlightenment philosophers attempted "a rational explanation of the universe ... marked by love of truth and contempt for superstition"[10].

The quotation from Diderot captures the faith in reason and the certitude about human progress which characterised the Enlightenment approach to history.

Reflecting on rational explanations of the universe, Albert Einstein said in 1938:

> "In our endeavour to understand reality we are [somewhat] like a man trying to understand the mechanism of a closed watch. He sees the face and the moving hands, he even hears it ticking, but he has no way of opening the case.[11]"

In our day of digital watches, in fact almost digital everything, the image of this ticking, mechanised clock is undeniably dated but still eloquent. The practice of history is a way of listening to the ticking of the world and a way of opening, or at least seeing

through, the case. It attempts a rational explanation of the world through memory, both individual and collective. If it aspires to be accurate, history must, as Diderot enjoins, "not spare sensibilities". Particular understandings of history, not always accurate and generally contestable, become embedded in culture, including in legal culture.

In an observation remarkably close to what Diderot said, the Canadian historian, Margaret Macmillan, has stated relatively recently:

> "History should not be written to make the present generation feel good but to remind us that human affairs are complicated[12]."

The law has its own dynamic relationship with the past in that judges adjudicate human disputes and have the power to identify, characterize, and sanction past human conduct.

To return to the topic of the varieties of history, in his book *What is history?* published in 1961, the historian Edward Carr famously answered the question "What is history" by saying history:

> "is a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past[13]."

As I have already mentioned, a lawyer's dialogue with the past is severely constrained by the issues as defined for trial by reference to the law, including the laws of evidence, which would make the practice of history impossible. A judge is required to determine only the facts which are relevant to the issues as framed and he or she is then required to apply the law to those facts. Such

enquiries are clearly distinct and circumscribed compared with the historical method described by Carr.

The 1960s onwards saw the expansion of a different way of practising history where the focus is on interpreting society and seeking the meaning in and of cultures. Cultures depend on shared understandings which explains why jokes are so easy to appreciate in one's own culture and often so difficult to comprehend in another. Cultural history resulted in works like E.P. Thompson's work *The Making of the English Working Class*[14]. This work exemplifies an historical method which seeks to understand a subordinated culture which is not necessarily part of dominant culture or part of what have been (perhaps too dismissively) called the grand or metanarratives of history. Interest in subordinated cultures, and the techniques developed to bring them into the foreground of the historian's attention, also served the long overdue development of women's history and indigenous history. Such developments have flowed through to the field of jurisprudence which now includes, amongst other examples, a body of work recognised as feminist jurisprudence.

Finally, in this snapshot of the varieties of history, Michel Foucault should be mentioned. The French philosopher did not see history as Diderot or Carr did. He was not interested in smooth evolutionary accounts of history but spoke of ruptures and discontinuities. He was interested in the history of what he termed discourses. By discourses he meant both ways of speaking and also institutional practices and ways of thinking and doing. He spoke of the "episteme" of different periods of history, by which

he meant the structure which underlay historical understandings of a particular period. He said:

> "We want historians to confirm our belief that the present rests upon profound intentions and immutable necessities. But the true historical sense confirms our existence among countless lost events, without a landmark or point of reference[15]."

From that question you can readily see that this is a confrontational, if not polemical, way of practising history. Foucault certainly deployed it to expose what he saw as human hypocrisy. He regarded the law as a rigid repository of power in that there was an element of arbitrariness, he claimed, in what the law marked out as illegal conduct or behaviour. Broadly speaking, he saw the law as enforcing bourgeois values in a manner which was intolerant of human diversity.

This is a highly tactical use of history which has had an influence on the law and on the language and practice of politics. Modern commitment to social and other inclusiveness owes a debt to this particular way of practising history, at least insofar as it has provided to long held liberal views a sharp polemical focus and rhetoric. We have numerous statutes, as you have also, which prohibit discrimination on certain identified grounds; such laws are aimed at creating an inclusive society which is tolerant of human differences. They are also aimed at achieving equality of treatment in social contexts such as employment.

It has been observed that Foucault's type of post-modernism has "produced a situation where there has now developed a mass of

historical genres"[16]. This has complex implications for the practice of history.

For example, in "The End of History and the Last Man", published in 1992, the American historian Francis Fukuyama made a teleological point: he contended that the evolution of human society had reached an end with the triumph of capitalism, the spread of liberal democracy and a free market economy. Well, I suppose much depends on what you mean by history.

Speaking more generally, old organising historical frameworks, now said to privilege various groups, as evidenced by epithets like "Anglo-centric" or "Euro-centric", are no longer regarded as legitimate[17]. Rather such frameworks are seen as constructs which serve to advance quite specific interests[18]. One side effect of these developments is a discernible rise in scepticism which flows into public attitudes towards the administration of justice. Another side effect – or even reaction - I think, is the immense current popularity of the personal memoir, and of biography generally.

A biography is by definition a coherent narrative which claims historical accuracy, and the genre of autobiography plainly defies postmodern slogans about the death of the author. On the other hand, these genres may represent not so much a retreat from orthodox history but a validation and valuation of individual experience over and above any collective account of major historical events or change.

A further side effect is the emergence of "history wars", or, in broader contexts, culture wars, where highly contested versions of the past are enlisted to support conflicting political and social positions on matters of public concern such as, for example, past treatment of indigenous Australians, or the contents of the history syllabus in secondary schools. Again, the history of the past treatment of indigenous Australians has an impact on the law in relation to land claims and compensation claims in relation to the forced removal of children from their families.

David Cannadine in his *Making History Now and Then*, published in 2008, sees history as having been "stimulated and enriched by the insights of post-modernism"

[19]. He goes on to say[20]:

> "[H]istory makes plain the complexity and contingency of human affairs and the range and variety of human experience; it enjoins suspicion of simplistic analysis, simplistic explanation, and simplistic prescription; it teaches proportion, perspective, reflections, breadth of view, tolerance of differing opinions, and thus a greater sense of self-knowledge."

The varieties of history which I have mentioned reflect the capacity of history to function not only as a human narrative but also as a corrective to individual or unfairly weighted human narratives. The latter function highlights the fact that a proper study of the past, by whatever method, usually reveals a past at once more complex and more nuanced than might otherwise be assumed. Official documents may tell one story whilst personal diaries and memoirs tell quite another.

Let me turn now to two examples where an understanding of history enhances an understanding of the law, one specific and one general.

In *New South Wales v Corbett*[21] the High Court of Australia had occasion to consider the validity of a search warrant under the *Search Warrants Act* 1985 (NSW). This was a complete statutory code in respect of search warrants and common law search warrants had been abolished by a particular section of the Act.

The degree of particularity required in search warrants has a long and interesting history which was relevant to the particular issue in this case. The grant of search warrants in respect of stolen goods constituted the first exception to the principle that a person's home was inviolable. In *Bostock v Saunders* reported in 1773[22], when dealing with a search warrant obtained by Commissioners of Excise, De Grey CJ described common law precautions in respect of search warrants as follows:

> "Every man's house is his castle. Lord Hale ... lays down these guards upon executing search warrants ... even at common law: - 1. There must be an oath; 2. Grounds declared; 3. The warrant must be executed in the day-time; 4. By a known officer; 5. In the presence of the party informing."

General warrants which did not particularise a person whose premises were to be searched or the objects of the search were used for the purpose of controlling the writing and printing of seditious or radical political works, first by the Star Chamber, then by the Secretary of State.

In a trio of cases in the middle of the 18th century, after licensing of publications was no longer required, the common law courts struck down such general warrants. In *Wilkes v Wood*[23] Lord Pratt CJ (later Lord Camden) instructed a jury that a warrant which did not identify a particular object of the search was "totally subversive of the liberty of the subject"[24]. In *Money v Leach*[25] Lord Mansfield CJ found a general warrant invalid in circumstances where no person was named and no particulars were given to identify the premises and the object of the search. The principle that the object of the search must be specified in a valid warrant was confirmed in *Entick v Carrington*[26]. Those three well-known cases led to the English Parliament's famous declaration by resolution, in 1766, that general warrants were unlawful. This was a major constitutional development.

Coming back to the present, in the Second Reading Speech in respect of the New South Wales Act under consideration, the Attorney-General referred to *Entick v Carrington* and in acknowledging the continuation of common law principles in the statute he said: "freedom from arbitrary search was hard fought for in our constitutional history"[27]. It can be noted that the need to specify the object of a search by reference to a particular offence is now a common statutory requirement in Australia. The case is a good and clear example of history, as envisaged by Carr, illuminating the legal issues then under consideration.

It is not without interest that the common thread of the 18th century cases to which I have just made reference was the importance of personal autonomy and the need to ensure that

search powers could not be exercised arbitrarily. The same thread runs through the recent judgment of the European Court of Human Rights concerning the stop and search powers provided by ss 44 and 45 of the *Terrorism Act* 2000 (U.K.)[28]. The applicants succeeded in their claim that the use of the powers in relation to them breached their rights to respect for private life under Article 8 of the European Convention on Human Rights. In the House of Lords, Lord Brown had observed that the exceptional statutory stop and search powers "radically ... depart from our traditional understanding of the limits of police power"[29]. The traditional understanding to which Lord Brown referred is grounded, at least in part, in the constitutional history to which I have been referring.

A second and quite different example of the importance of understanding history in a legal setting concerns the use of victim impact statements as part of the sentencing process after conviction. If one goes far enough back in time, victims undertook the prosecution of their own cases. Furthermore, there was no professional police force in England until 1829. The possibility of private prosecutions today reflects that history.

The establishment of a Director of Public Prosecutions, in England by statute in 1879[30], occurred in circumstances where it was widely considered preferable for the State to undertake the prosecution of crime through a dedicated officer of the State. In his book *Prosecution and the Public Interest*, Sir Thomas Hetherington spoke of the history behind the establishment of a Director of Public Prosecutions in England. He said that the idea of having a state law officer undertake prosecutions was first mooted

by Henry VIII who suggested in 1534 that "laws are not put into force unless it be by malice or rancour or evil will"[31]. To remedy that situation the King suggested that 'Sergeants of the Common Weal' should act as prosecutors[32]. It is not easy to imagine Henry VIII having an independent prosecutor. In any event, for the next two and a half centuries the idea slumbered. It was revived partly as a result of Jeremy Bentham's publication in 1790 of a work entitled "Organisation of the Judicial Establishment" which contrasted the English and French prosecution systems. Many committees, debates in Parliament and private members' bills later, the *Prosecutions of Offences Act* 1879 was eventually passed. Before that Act, the Attorney-General had been the State's chief prosecutor as well as having a multiplicity of other duties.

It has long been thought that prosecution of crime by the State, rather than by private persons, would bring a certain objectivity and neutrality to that difficult task. Under such a system, a victim's role was confined to giving evidence on behalf of the prosecution. In our own time we have witnessed the emergence of victim interest groups, which started out for mutual support but developed into groups with a much wider remit. The processes associated with prosecution to conviction and sentence attracted a great deal of public scrutiny at the urging of victims' groups. Some dissatisfactions were vigorously expressed which had the inevitable effect of deauthorising the administration of justice. Accordingly, change was inevitable.

Eventually sensibilities shifted as to whether it was, or was not, appropriate for victims to be associated in the criminal trial

processes at the sentencing stage. We have gone from being a society which excluded victims from the criminal law process, except as witnesses, to a society which includes victims' voices at the sentencing stage. This reflects major cultural change which as I mentioned before is the subject of a particular variety of history. This historical change in sensibilities has affected criminal law quite profoundly. To put the point in Foucauldian terms, it was not an "immutable necessity" that victims be excluded from the sentencing process.

It would be possible to multiply both specific and general examples of the contribution of history to some aspect of the law. History in all its varieties can not only affect legal culture but, in an appropriate case, it can also assist in the resolution of a legal problem.

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[1] *Cheatle v The Queen* (1993) 177 CLR 541 at 549-552. See also *Brownlee v The Queen* (2001) 207 CLR 278 at 284-285 [5]-[12] per Gleeson CJ and McHugh J, at 299-300 [58] per Gaudron, Gummow and Hayne JJ and 321-322 [125]-[127] per Kirby J, and 341 [182] per Callinan J; *Fittock v The Queen* (2003) 217 CLR 508 at 574-575 [19] per McHugh J; *Ng v The Queen* (2003) 217 CLR 521 at 526 [9] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

[2] *Mabo v Queensland* (No 2) (1992) 175 CLR 1; [1992] HCA 23.

[3] *Wik Peoples v Queensland* (1996) 187 CLR 1; [1996] HCA 40.

[4] Sir Owen Dixon, "Concerning Judicial Method" in *Jesting Pilate and Other Papers and Addresses* (collected by Judge Severim Woinarski) (2nd ed, 1997) at 2.

[5] Op cit at 3.

[6] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 340.

[7] Quoted by Margaret Macmillan in *The Uses and Abuses of History*, (2008) at 43.

[8] Maitland, "Why the History of English Law is not written", in Fisher (ed), *The Collected Papers of Frederick William Maitland* Vol 1 (1911) at 491.

[9] From the "Encyclopédie". For this quotation and the quotation from Einstein I am indebted to the compilers of a study sheet prepared by the School of Historical Studies, University of Melbourne, for the subject Varieties of History.

[10] Harvey, *The Oxford Companion to English Literature,* (1946) at 260: entry for "Encyclopédie".

[11] See above n 9.

[12] Margaret Macmillan, *The Uses and Abuses of History*, (2008) at 127.

[13] E.H. Carr, *What is History?*, (1961) at 24.

[14] E.P. Thompson, *The Making of the English Working Class,* (1963).

[15] "Nietzsche, Genealogy, History" in *The Foucault Reader*, (Paul Rabinow ed.) at 89.

[16] Keith Jenkins, *Rethinking History*, (Reprint: 1997) at 59.

[17] Op cit. at 60.

[18] Ibid.

[19] David Cannadine, *Making History Now and Then,* (2008) at 4.

[20] David Cannadine, *Making History Now and Then,* (2008) at 5.

[21] (2007) 230 CLR 606; [2007] HCA 32.

[22] (1773) 2 Black W 912 at 914; 96 ER 539 at 540.

[23] (1763) Lofft 1; 98 ER 489.

[24] (1763) Lofft 1 at 18; 98 ER 489.

[25] (1765) 1 Black W 555; 96 ER 320.

[26] (1765) 2 Wils KB 275; 95 ER 807.

[27] New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 27 February 1985, at 3859.

[28] *Case of Gillan and Quinton v The United Kingdom* (Application no 4158/05) 12 January 2010.

[29] *R (on the application of Gillan (FC) and another (FC)) v Commissioner of Police for the Metropolis and another (Respondents)* [2006] UKHL 12.

[30] Edwards, *The Law Officers of the Crown*, (1964) at 3.

[31] Hetherington, *Prosecution and the Public Interest*, (1989) at 4.

[32] Ibid.