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IS LEGAL HISTORY NOW ANCIENT HISTORY?

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This lecture honours one of Australia's finest historians, Emeritus Professor Geoffrey Bolton. So far as the nation's lawyers are concerned, his place amongst the leading historians of Australia is assured by his outstanding biography *Edmund Barton: The One Man for the Job* (2000).

Sitting in the number one court of the High Court of Australia in Canberra, one cannot escape the presence of Barton. He looks down on the Justices, the Bar and his future compatriots with benign indulgence. A cigar in his hand hints at an avuncular personality. Fortunately, for modern political correctness, the cigar is now quite difficult to make out, being enveloped in the rich tones of black and brown that dominate the portrait.

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[*] Justice of the High Court of Australia.

Of the three foundation Justices of the High Court, Barton alone is displayed in civilian dress. It is as if he has just wandered into the Court after his most important work, as the first Prime Minister of the new federal nation, had been done. Which is exactly what happened.

In his summation of Barton's life for the *Oxford Companion to the High Court of Australia*[1], Geoffrey Bolton points out that Barton's work as a nation-builder was the task that he performed both in the Parliament and the Court[2]. Interestingly, in the context of a lecture on an historical theme, Professor Bolton records that all three of the foundation Justices of the High Court were adamant that the Convention Debates, in which were recorded the development of the text for the Australian Constitution, should not be used in arguments before the Court. This was because, as Barton explained: "Individual opinions are not material except to show the reasoning upon which the Convention formed certain decisions"[3].

It was this embargo on history that restricted the use of that important evidence for eighty-four years until, in *Cole v Whitfield*[4], the

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1 T Blackshield, M Coper, G Williams, Oxford University Press, 2001, 53-56.

2 *Ibid*, 56 (written with John Williams).

3 *Ibid*, 55 citing *Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 237.

4 (1988) 165 CLR 360 at 388-391.

High Court overturned its prohibition. To find a clearer path towards the meaning of s 92 of the Constitution, the Court turned to legal history and specifically the Convention Debates. The result has proved controversial but decisive[5]. Now there is relatively little dispute that, in constitutional as in other cases, the history of any applicable law may be considered if it throws light on the meaning of the text or helps to remove any ambiguities which the language presents to the decision-maker. In this sense, history has become an accepted working tool of the Bar in Australia and of the busy judge. It does not control the meaning of legislation, least of all the Constitution with its special functions[6]. However, there is now no self-denying ordinance to forbid an understanding of the history and the "mischief" which history can sometimes reveal as the purpose of the written words.

I pay tribute to Geoffrey Bolton's long and brilliant career as an historian. We are both children of Australia, born in the 1930s. But for the hand of fate, I might have been his companion in the discipline of history. In the New South Wales school leaving certificate of 1955, the chief examiner in modern history was Professor John Ward of Sydney University. He marked my scripts in that subject with First Class Honours. Indeed, he placed me first in the State. Full of the assurance

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5 G V Puig, *The High Court of Australia and Section 92 of the Australian Constitution*, Law Book Co, 2008, x.

6 *Grain Pool (WA) v The Commonwealth* (2000) 202 CLR 479 at 522-523 [111].

of youth, at Sydney University I elected to switch from modern history to the ancients. Alas, Neb-heput-re-mentohotep and the Pharaohs proved my nemesis. In Year I of Arts, I scraped a bare pass in ancient history. My glorious professional career as an historian was over before it began.

History's loss was (I declare) law's gain. I was quickly to discover that law is all about history. Or so it seemed in 1958 when I came up to the Sydney Law School, then housed in shabby buildings in University Chambers in Phillip Street. There, legal history was taught to huge classes from which we could peer across the street at the furiously busy barristers in their chambers, preparing for court. Their activity reminded us that life in the practice of law commonly gave few opportunities for esoteric explorations of historical questions. Law was analysis not, as such, theory or synthesis.

The 1950s and 60s in Sydney and Australia represented the high noon of "strict and complete legalism"[7]. Even after the advent of that great historian judge, Sir Victor Windeyer, the edict of Chief Justice Dixon prevailed. Excessive reflection upon history might divert impressionable minds from the analysis of the words of statutes and decisional law. It might tempt young brains into impermissible reflections upon the deep purposes of the law that history so often presents for speculation.

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[7] Sir Owen Dixon, Speech on Swearing-In as Chief Justice (1952) 85 CLR xi at xiv.

Given that Geoffrey Bolton is himself a legal historian - at least a historian of one of the great figures in Australian constitutional law – I need not apologise for converting my ‘return of the native’ to a temporary engagement with my lost discipline, interrupted so cruelly by those heartless results of 1956. I will use this lecture to reflect upon the state of the teaching of legal history in Australia, specifically in its law schools. I will ask whether we are satisfied with that condition?

If we consider that the falling away in the teaching of legal history for young lawyers is an undesirable outcome of the modern age, why do we think it so? Is this simply a belief that the compulsory study of legal history up to the 1950s, as one of the core curriculum subjects for every young law student, was essential because it helped to prepare for professional service someone as estimable as oneself? Or is there a deeper reason why, as a profession, lawyers should be readied for their life’s work with a thorough understanding of legal history? If so, should it be the same legal history as was taught in Australian law schools until the 1950s?

In short, is it really necessary, in order to be an Australian lawyer in the current age, to receive instruction on the doings of the Plantagenet kings of England and the reasons behind the *Statute of Mortmain* or the *Statute of Merton*? If legal history should be restored to something of its former glory in Australia, in competition with so many other modern subjects that jostle for attention in the law syllabus, what changes are

needed to render it more appropriate and congenial to an age with differing needs and interests from those of the far off days in the middle of the twentieth century?

RETURN TO THE FIFTIES

It is appropriate to begin my reflections on these questions, and the answers that I would tentatively offer, by journeying back to the 1950s when I first made acquaintance with the discipline of legal history. Fortunately, I am helped on this journey by Australia's foremost legal historian, Dr John M Bennett. For his painstaking studies of legal history, and the brilliant compilation of a series of biographies of Australia's colonial chief justices, contemporary lawyers and citizens are deeply in his debt. Happily his patient work on our professional chronicles has been recognised with proper civil and university honours[8]. I am proud to call Dr Bennett a friend. Often he reminds me of my lost career as an historian by joining me at lunch in Canberra where, invariably, he has another colonial judicial biography to present as a gift.

In the *Australian Dictionary of Biography*[9], John Bennett records the life of the scholar who taught legal history to my class of law

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[8] For his historical writing, Dr John Bennett AM has been awarded a number of doctorates, honorary and examined.

[9] Vol 13, 1993, entry on "Currey, Charles Herbert", 548-549.

students at the Sydney Law School in 1958, exactly fifty years ago. I refer to Charles Herbert Currey (1890-1970). In those days, there was no personal familiarity with such a venerable teacher. For us, he was "Dr Currey", certainly not "Charley". Sitting in his class that year were Murray Gleeson (later to be Chief Justice of Australia), Graham Hill and Brian Tamberlin (later judges of the Federal Court of Australia), David Hodgson (later Rhodes Scholar and now a Judge of Appeal in New South Wales), Jane Mathews (later and once again a judge of the Supreme Court of the State), Kim Jones (who was to become our Ambassador to Paris and later Head of the Office of National Assessments) and many others.

When I first laid eyes on him, Dr Currey had been teaching at the Sydney University Law School since 1933. He was to continue this service until 1961. He squeezed such toil into work as senior lecturer in history and political science at the Sydney Teachers' College. Although admitted to the profession in 1922, Currey had never practised law. Yet he had risen high in the affairs of the Royal Australian Historical Society, serving as President in the years coinciding with our classes (1954-59). Those, according to Dr Bennett, were "turbulent times, exacerbated by [Currey's] own argumentative temperament". From his own period of service in that Society, Dr Bennett knew only too well the passions that can break out amongst historians. In Currey's case he describes these as "remarkable, alike for venom and want of ratiocination"[10].

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10 *Loc cit*.

Dr Bennett observes that "Currey's wit as a lecturer rarely showed in his books where he preferred a stilted and ponderous vocabulary". I must admit that I have no memory of wit on the part of Currey, the lecturer. He was a large man and seemed terribly old - yet I now realise that, when he was lecturing us, he was quite young: being of the same age as I now am. He always wore a dull and crumpled grey suit. His lecturing tones were monotonous. A great part of his lectures was consumed in the doings of medieval England. Despite this, his major books had been about Australian history: *The Irish at Eureka* (1954), *The Transportation of Mary Bryant* (1963), *The Brothers Bent* (1968) and his monumental work *Sir Francis Forbes* (1968). In those days, as Professor Alex Castles as later to describe it, Australian legal history was generally crammed into the last hours of a course overwhelmingly concerned with British legal history. In the way of the world of 1958, Australia's legal history was but a footnote to, and a post-colonial evolution from, the legal history of those rainswept islands off the coast of Europe where virtually everything that was important to our legal knowledge was done, in part for our benefit[11].

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[11] Alex Castles published his *Introduction to Australian Legal History* in 1971 and a source book (jointly edited by him and John Bennett) in 1979. See W Prest, "Law and History: Present State, Future Prospects" in *Law and History in Australia*, La Trobe University, May 1982, 29; and W Prest, "Legal History in Australian Law Schools, 1982 and 2005" (2006) 27 *Adelaide Law Review* 267.

Dr Currey lived at Strathfield in Sydney, not far from my parental home at Concord. But I would never have dreamed of dropping in on him. These were not the days of email-friendly lecturers. He had his law school notes. He read them to us. They were of great detail. Many, perhaps most, were tedious and unmemorable. Yet every now and again the lectures would leap into life with stories, vivid and relevant for aspiring law students:

- The tale of the execution of King Charles I, that established the ascendency of the English Parliament over the King[12];
- The story of Cromwell's republic, which was never then advanced as a model for Australian governance, so soon after the first visit to our shores in 1954 of Queen Elizabeth II;
- The astonishing story of the 'Glorious Revolution' and the *Act of Settlement* that secured basic rights and the independence of the judges;
- The American Revolution of 1776 and the consequent search for a substitute penal colony that led to Governor Phillip's voyage to Botany Bay;
- The gradual evolution of the English system of constitutional government and Dicey's theory of the sovereignty of Parliament; and

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12 M D Kirby, "Trial of King Charles I: Defining Moment for our Constitutional Liberties" (1999) 73 *Australian Law Journal* 577.

- The postscripts about Australia's evolution from colony to federal nation.

When Dr Currey turned to these subjects, legal history suddenly came to have a fresh relevance. When a student, Currey, like his predecessor at the Teachers' College, Sydney, K R Cramp, had been drawn to Australian history. It was Professor G A Wood (as "Professor J M Ward observed) who 'enlivened [Currey's] passionate belief in liberty - and in history as the story of liberty"[13].

Currey's rare LLD from Sydney University (1929) was conferred for his thesis "Chapters on the Legal History of New South Wales". Dr Bennett describes that work as having entered "a previously unexplored field". In the crescendo of his lectures to us on legal history, when he reached those stories of local events and controversies, Dr Currey's heightened engagement with his discipline became evident. It was heady stuff for first year law students. Above all, it provided a perspective of the time frame of our law and an understanding of our legal institutions and law-making that seemed natural as a grounding for all of the particular subjects in our curriculum that were to follow.

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[13] Above n 9, *loc cit*.

AUSTRALIAN TEACHING OF LEGAL HISTORY

The way I was taught legal history by Dr C H Currey, was typical of Australian university curricula in the middle of the last century. If anything, the addition at the Sydney Law School of a component on Australian (especially New South Wales) legal history was unusual when compared, say, to the situation at the same time at the University of Melbourne. There, from 1939, the curriculum contained what was called "British History" and "Constitutional and Legal History".

By 1956, a typical four year law course in Australia contained sixteen subjects. In the first year there was taught "legal history" and "British history"[14]. They were usually compulsory subjects, as they had been for me.

Between the 1960s and 1980s, the proliferation of law schools in Australia led to more experimentation in curricula and variation in the subjects that were taught. By the 1980s the *de facto* control over the curriculum, exercised by the legal profession, was reported to have caused "considerable worry to law schools over the years"[15]. What then

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[14] Australasian Universities Law Schools' Association, Report No 2, *Legal Education in Australian Universities* (Butterworths, 1972), 10-13, par [1.2.6] ("McGarvie Report").

[15] Australian Law Schools, *A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Dennis Pearce, Enid Campbell and Don Harding), Vol 1 (1987), 90 [2.71].

emerged was an influential statement on subjects that should be required for professional admission purposes. This appeared in a report of the Victorian Council of Legal Education titled *Report of the Academic Course Appraisal Committee on Legal Knowledge Required for Efficient Practice* (the McGarvie Report)[16]. That report did not recommend a compulsory subject on legal history. However, it noted that, in the comparatively short interval of the previous twenty years, this subject had virtually disappeared from most of the Australian law courses[17]:

> "… A knowledge of legal history is basic to a full understanding of the system and a capacity to influence its development in a socially desirable way".

The report quoted what Sir Victor Windeyer had said in the first edition of his *Lectures on Legal History*, "A lawyer without history or literature is a mechanic, a mere working mason; if he possessed some knowledge of these, he may venture to call himself an architect".

Another report, of 1987, for the Commonwealth Tertiary Education Commission (known as the Pearce Report, after Professor Dennis Pearce, its chairman) observed[18]:

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16 *Ibid*, 91 [2.72]

17 *Ibid*, 107 citing *McGarvie Report* at 41.

18 *Id,* 107 [2.115].

> "Legal History as a separate subject in its own right has virtually disappeared from the curricula of law schools. Apart from some treatment in introductory legal process type courses, Legal History exists, if at all, only as an ill-patronised elective. Such history as students receive is limited to particular subjects. We do not see any revival of Legal History as a subject in its own right occurring in the foreseeable future. There are very few historians among law teachers. The lack of an obvious immediate relevance of history to the resolution of legal problems has meant that there has been no pressure on law schools from the profession or from students to include such a subject in the compulsory core. When Legal History was compulsory in law curricula, a position that existed up until the last 20 years or so, it was taught by staff members who were not historians, it was usually a first year subject and its purpose could not always be discerned by students. The committee considers that if Legal History is to be given a significant role in law school curricula again, considerable attention will need to be paid to its purpose and the point in the course when it is taken. It would be essential that it be taught by persons versed in historical methodology and not simply be a subject that is taken to make up a staff member's workload".

The Pearce Report was scathing about the way legal history had been taught in the past. It suggested that this was what had brought about its demise[19]:

> "… When compulsory formerly, it was a marked effort in the socialisation of law students into some of the more unfortunate aspects of legal thought. There was a heavy emphasis on the English law of the medieval period, with a particular concentration on land law and the forms of action. This sometimes led to a focus on the manipulation of rules in what could fairly be described as a Byzantine fashion - a method of legal thinking which for long has left its legacy on Australian law. If there were to be a return to Legal History we would see a need for it to be much more Australian oriented. But there is as yet very little Australian legal

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19 *Id*, 108 [2.116].

> historiography. We note that in Canada historians are being brought on to Faculty staffs with a view to achieving this".

The Pearce Committee suggested that legal history should be viewed with the study of legal theory but that radical changes were necessary in the content of both if there were ever to be a re-flowering of legal history in Australian law schools[20].

It is passing strange that the teaching of legal history suffered its sudden demise in Australian law schools at the precise time when important and useful texts were being published providing a comprehensive chronicle of Australia's own legal history. In 1982, Professor Alex Castles of the Faculty of Law of the University of Adelaide, published his standard text *An Australian Legal History*[21]. This work was supplemented by a book of source materials on Australian legal history. These works rendered the local story accessible whereas, substantially, certainly before the 1960s, it had been largely inaccessible[22]. In a way this inaccessibility had been one symptom of the lingering post colonial mentality that persisted both in the Australian legal profession and the judiciary, well past the first half of

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[20] *Id*, 108 [2.117].

[21] A Athaide, "Alex Castles on the Recognition of Australian Legal History 1955-1963" (2003) 7 *Australian Journal of Legal History* 107 at 127; S Petrow, "The Future of the Past - The Development of Australian Legal History" (2000) 8 *Australian Law Librarian*, (1) 4 at 7.

[22] Athaide, above n 21, 107.

the twentieth century. It probably persisted amongst historians of those days as well.

The prevalence of attention to British ideas, institutions and laws was the result of the continuing power (real or imagined) of the British Empire and of the "civilising mission" that it asserted for itself - at least in settler societies. The continuing subordination of Australian decisional law to the authority of the Judicial Committee of the Privy Council in London meant that, in those days, it was essential for Australian judges (and therefore practising lawyers) constantly to be looked over their shoulders to the doctrinal positions of English law.

Within Australia, well into the 1980s, departures from English judge-made law were relatively few. Australian courts were admonished by the High Court to follow decisions of the House of Lords, although that distinguished court had never been part of the Australian judiciary hierarchy[23]. Indeed, State Supreme Courts were told that, where no relevant High Court decision was available, they should follow the decisions of the English Court of Appeal[24].

We can now see that these were unnecessarily subservient rulings by Australia's highest court, inappropriate to the structure of

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[23] *Skelton v Collins* (1966) 115 CLR 94 at 104, 124, 133, 138.

[24] *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (19750 132 CLR 336 at 341, 348, 349.

courts that was created by the Australian Constitution. Yet it was not until *Viro v The Queen*[25] and *Cook v Cook*[26] that this excessive deference to English judicial authority was terminated.[27] As late as March 1988, Justice Gummow, writing in the *Sydney Law Review*[28], felt obliged to criticise the excessive Australian attention to English judicial decisions; the failure to use inter-jurisdictional Australian decisions; the large-scale ignorance (outside federal constitutional law) of United States judicial authorities; and the professional unwillingness to cite academic writing. He said[29]:

> "The High Court of Australia, in marked contrast to the House of Lords, has for many years (certainly since the appointment of Sir Owen Dixon in 1929) paid close attention to academic writings and has acknowledged its indebtedness in this regard. … Academic writing tends to look beyond the parochial and now has an even more important role to play in assisting Australian courts".

These observations (and the call by Professor Pearce for greater local relevance of legal subjects in the curriculum) did not represent attitudes of parochial nationalism. No one doubts that Australia's legal

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25 (1979) 141 CLR 88 at 93, 119, 132, 137, 151, 161.

26 (1986) 162 CLR 376 at 390; cf W M C Gummow, "Legal Education: Comment" (1988) 11 *Sydney Law Review* 139. This aspect of *Cook v Cook* is not altered by the recent decision of the High Court in *Imbree v McNeilly* (2008) 82 ALJR 1374 at [182]; [2008] HCA 40.

27 (1986) 162 CLR 376 at 443.

28 In (1988) 11 *Sydney Law Review* 139.

29 (2006) 27 *Adelaide Law Review* 267 at 272.

history was, and still is, profoundly affected by its well-springs in the history of Britain. But, by the second half of the twentieth century, the gradual release of the umbilical cord between the English judicial hierarchy and that of Australia meant not that the knowledge of English legal history was less important for Australian lawyers. It was just that knowledge of our own legal history had become much more important.

Why then was it that the teaching of local legal history fell so suddenly and dramatically away? If it was thought that English legal history, and all the Plantagenets, were only of marginal utility for an understanding of Australian law, why did a number of law teachers (increasingly by this stage academics and not practitioners) not take up the challenge of teaching Australia's own legal history as a proper foundational subject for an understanding of the structure and content of the nation's law?

In the United States of America where, after the Revolution, there was no institutional judicial link to explain continuing subservience, and where there was much home-grown legal history to be told, a similar decline in the teaching of legal history had happened and at about the same time. In an influential article in 1967 on the teaching of legal history in that country, Calvin Woodard[30] described what happened[31]:

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[30] C Woodard, "History, Legal History and Legal Education" 53 *Virginia Law Review* 89 (1967).

[31] *Ibid* at 89-90.

> "… [N]otwithstanding various *indicia* of robust activity and interest, few would deny that the significance of Legal History to legal education is, to put it bluntly, marginal. According to an elaborate survey of American law schools conducted in 1963 by Professor Edward Re, only 31 of 115 responding institutions included in their curricular a course that could, by any stretch of the imagination, be categorised as 'Legal History' and undoubtedly, the great bulk of the graduates of American law schools proceed to their degrees without ever having had the slightest taste of Legal History. … Speaking as a teacher of the subject, I believe that most students (including, no doubt, my own) find the subject, at best, a bore. To some, those most strongly oriented towards the work-day world, it seems to have nothing to do with the business of learning to be a lawyer. To others, made weary by a seemingly endless trek through a Sahara of academia, it is yet another barren stretch of arid 'culture' to be endured as painlessly and as passively as possible. [To still others] though interesting enough, an appallingly uneconomic expenditure of time".

So what has occurred in the last thirty years since this trend was first noted and commented upon? When recently in Canada, I learned that the teaching of Canadian legal history is still unusually regarded as a core subject in that country's law schools. [32] It is a topic of instruction in virtually every law school. The same cannot now be said of Australia or in the United States.

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[32] See eg P Girard, "Who's Afraid of Canadian Legal History?" (2007) 57 *Uni of Toronto Law Journal* 727 at 728.

THE POSITION REACHED IN AUSTRALIA

I asked Professor William Ford of the University of Western Australia (UWA) to provide me with up to date data on the current teaching of legal history in Australia as at 2008. There are now thirty-one Australian law schools. The resulting table is instructive:

Table of the Offering of Legal History Courses at Australian Law Schools 2008

ANU	Included in 6 subjects / comparative study planned
Canberra	Nil
Newcastle	Nil
Macquarie	Elective (last run 2006, 6 enrolments)
Sthn Cross	Nil
UNE	Nil
UNSW	Elective (last run 2004, 17 enrolments)
Syd Uni	Nil
UTS	First year core in 'Legal Process', 466 students
UWS	Nil
Wollongong	Nil
Chas Darwin	Elective (NT Law)
Bond	Nil
Griffith	Nil
James Cook	Nil
QUT	Nil
USQ	Nil
UQ	Elective
Flinders	Elective
Adelaide	Elective (last offered 2006)
Uni SA	Nil
Uni Tas	Nil
Deakin	Nil
La Trobe	Nil

Monash	Nil
Uni Melb	Nil
Victoria	Nil
Edith Cowan	Nil
Murdoch	Included in "Legal Theory"
Notre Dame	Required (76 enrolments)
UWA	Optional. Nil in 2009.

The news is not quite as grim as the proliferation of "nil" returns might suggest. In some law school curricula, courses in legal history are notionally included (ANU, Newcastle, UWA) but the subject is not presently offered because of staffing changes. Most of the law schools protest that they include some lectures on legal history as introductory to particular subjects or as part of the first year course on legal process (eg UTS, Griffith, Adelaide from 2009, Melbourne as a possibility from 2011). However, depressingly, in most of the law schools surveyed in 2008 there is a blunt report that they do not have a course. Moreover, they have no plans to introduce legal history as a unit. They do not even intend it as an optional subject for study in the law school at this time or in the foreseeable future.

Some of the reports to Professor Ford confess to a feeling of regret that this is so. They blame the outcome on the omission of legal history from the "Priestley eleven", by which the core subjects of the legal curriculum are now mandated throughout Australia. This omission

is said "inevitably [to] lead to legal history being marginalised - to the detriment of the academic discipline of law"[33].

The best glimmers of hope for the reintroduction of legal history appear in law schools (such as the University of Adelaide and the University of Melbourne in its post-graduate format) which are presently undertaking major curriculum revisions. The Melbourne Law School reporter stated that it "wouldn't surprise … if a dedicated legal history unit, taught once every two years, was introduced [by 2011]"[34]. Exotic comparative law history courses in "Italian/civil law" and "Celtic law and society" (Murdoch) appear to reflect the expertise of particular staff who are available. But overall, the 2008 report shows the profound change that has come over the training of Australia's future lawyers in the space of fifty years, indeed in the shorter interval of thirty years since Alex Castles provided his basic texts.

No longer can we blame the decline and fall of legal history teaching in our law schools upon those supposedly irrelevant Plantagenets. Now, it seems, there is no perceived interest among law teachers in teaching future lawyers about the way the law existed in this continental country prior to European settlement; how English law was introduced on the proclamation of British sovereignty; how it was

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[33] Recorded comment of Mark Lunney (UNE).

[34] Recorded comment of Cheryl Saunders (Uni Melb).

developed in colonial times quite rapidly through a representative democracy that is one of the oldest in the world; how it produced a federal system with the sixth oldest Constitution still operating anywhere in the world; and how it has developed and adapted its laws and institutions to a situation of full independence at least since 1986[35] and, in truth, for many decades before[36].

Should we be concerned about this change that so markedly down-grades the importance of legal history for those who are being readied to take leadership roles in the legal profession? Does it matter that our future practising advocates and those who will hold powerful offices and inherit the judicial function will not have this training and understanding? Does anyone care about these developments? Should we care?

IT DOES NOT MATTER MUCH

Needless to say, the attrition in the teaching of legal history in law schools, not only in Australia, has attracted a lot of comment amongst judges and lawyers. They have their own interests in legal education. Most have strong (and sometimes conflicting) opinions about what is,

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35 *Australia Acts*, 1986 (Cth and UK).

36 cf *Attorney-General (WA) v Marquet* (2003) 21d7 CLR 545 at 612 [202] ff.

and is not, essential to prepare a person for a life in the profession of law.

The question of what is absolutely necessary as part of the preparation for legal qualifications is a highly controversial one[37]. Whilst it is true that judges of our tradition are not mere technicians, and must be expected to have at least some general grounding in the history of the legal system they help to administer, not every law student hopes, or aspires, to be a judge. Is it therefore necessary to include legal history *for all*? Or is it sufficient to provide *some* grounding in professional and institutional history and an option for those high flyers who feel the need to comprehend the system as a whole?

The debates about the role of legal history in educating future lawyers are by no means new. The part that history has played has always been contested: going back to the reintroduction of university courses for lawyers in Britain in the nineteenth century[38]. There have always been dissident voices suggesting that it may be in the interest of the law *not* to bring too much history into its deliberations. Especially so

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37 E Bodenheimer, "An Experiment in the Teaching of Legal History" (1950) 2 *Journal of Legal Education* 501

38 M Lobban, "Introduction: The Tools and the Tasks of the Legal Historian" in A Lewis (ed), *Law and History* (Current Legal Issues, 2006), Vol 6, 1.

in the current age of globalism and materialism[39] and with so much law to be learned, now increasingly produced in statutory form.

In such cases, the essential duty of the lawyer is to give effect to Parliament's commands in the terms of the legislation in which those commands have been expressed. It is not to gloss the statute with excessive attention to the antecedent history of the common law or of equity or old enactments that preceded the modern legislation. According to this view, it is a mistake that all too often happens in the common law tradition that we take our eyes off the parliamentary text because of deference to the doctrine of precedent; the high regard paid to judicial over parliamentary statements of the law; and the presumption (until recently) that legislation was an intrusion upon the purity of the common law as expressed by the judges.

In the High Court of Australia, we have had our own debates concerning the extent to which it is useful, in understanding contemporary Australian legislation, to pay close attention to the legal history of England that preceded our home grown enactments. Such questions have arisen, for example, in the area of State revenue law concerning the position of "charities". The starting point has tended to be a statute of the first Queen Elizabeth[40]. But why is this still so? There

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[39] J H Baker, *An Introduction to English Legal History* (4th ed, 2202) v.

[40] See eg *Central Bayside General Practice Association Ltd v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168 at 201

Footnote continues

have also been debates in relation to various Australian federal laws and whether it is helpful to seek to understand them by examining the preceding English legislation of the nineteenth century, often expressed in different terms and representing the command of a different Parliament operating in a different society[41].

For some observers of the decline of instruction in legal history in Australian law schools, the result is nothing more than the natural shift from common to statutory law. This also helps to explain the decline in the teaching of Roman law. Or of comparative civil law. Such topics (interesting as they may be) cannot nowadays throw much light on an understanding of a contemporary local Australian statute. For many observers, the emphasis of legal education should therefore be (as the Harvard Law School has recognised having originally pioneered the case book method with its attention to judicial decisions) upon statutory interpretation as the primary focus for contemporary lawyerly training.

People of such an opinion remember the "ripples of laughter" that accompanied the assertion by professors of legal history that contemporary lawyers would understand their discipline better if only they appreciated that the latest legal question was best resolved with a

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[93] ff. *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

[41] *Coventry v Charter Pacific Corporation Ltd* (2005) 227 CLR 234 at 249-253 [35]-[51]; cf 266-268 [108]-[113].

knowledge of what had happened in the reign of King Edward III and in the decisions of long-forgotten English judges, hidden in the medieval *Year Books*[42].

Other commentators have suggested that the real mischief of the old concentration on English legal history in Australian law schools was that it achieved a kind of English psychological control over Australian legal imaginations. We were locked into British ways of thinking about the law. This controlled how we saw law's role and purpose in society. It encouraged a peculiarly English analytical and so-called "objective" tradition.

There is more than a hint of this criticism in the Pearce Committee's distain for the way in which legal history had traditionally been taught in Australian law schools, well into the second half of the twentieth century[43]. Especially for Australian lawyers of a practical bent (often voicing their opinions through the professional representatives on curriculum bodies) the teaching of jurisprudence and legal history had little immediate or "practical" value in the age of statutory law, time charging, high technology and international legal practice. British legal history and British precedents do not now have any necessary or immediate utility for the resolution of most Australian legal problems.

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[42] B V Murphy, "Legal History as a Course", 10 *Journal of Legal Education* 79 (1957).

[43] See above.

For such commentators, it was natural mid-century for Australians, who had grown up with fierce settler loyalty for the British Crown, for the Empire and for its "civilising mission", to accept as automatically applicable the rules laid down in British legal history, as absorbed into Australian law. Yet, when those rules were closely examined, some of them, certainly by the 1980s, seemed quite irrelevant or alien to the Australian environment. Thus, British history did not have any significant equivalent to the problem presented for the laws of Canada, New Zealand, South Africa and Australia in their treatment of indigenous peoples. British legal history had included a statutory provision disqualifying the monarch or the monarch's heirs if they embraced the Roman Catholic doctrines of Christianity. British legal tradition also accepted (as it does to this day) an hereditary component in the House of Lords which would not be tolerated in most other countries of the Commonwealth of Nations. Law (including constitutional law) is very much culture bound. It is profoundly affected by history, values, economics and social needs. What works, or worked, in the United Kingdom will not necessarily do so in Australia. Nor is it necessarily applicable to the Australian situation.

All of these are reasons for shifting, as Justice Gummow urged in 1988, to a heightened concentration on our own statutory and judicial laws and a greater willingness, for comparative law purposes, to look elsewhere in Australia and to other countries (including the United

States) rather than continuing with a now outmoded subservience to British history and legal concepts[44].

The realisation that the time had come to end the "socialisation of law students into unfortunate ways of thinking" therefore contributed to the rapid decline in the teaching of legal history as it had existed in the past. This was so because each generation of lawyers tends to experience a history that idealises elements of the past. Yet the ideals often melt away under more accurate historical analysis. An instance of this in the American context is the revelation of Thomas Jefferson's long-standing intimate relationship with a slave, Sally Hemings, and the anxiety that this reality, when disclosed, caused to some American lawyers upset by the discovery of previously unknown truths concerning a hero of liberty and of the Revolution[45].

Still other critics of the past suggest that, whatever utility may once have existed in the study of legal history, the marginal cost of restoring its teaching would not be warranted in Australia by reference to its marginal utility. There are now many more subjects that need to be studied in a modern law school in order to prepare a lawyer for a life in practice - not least in the burgeoning field of statute law. As well, the

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44 Gummow, above n 29, 442.

45 A Gordon-Reed, "Uncovering the Past: Lessons from Doing Legal History" 51 *New York Law School Law Review* 856 at 859, referring to A Gordon-Reed, *Thomas Jefferson and Sally Hemmings: An American Controversy* (1997).

examination of social science research and an appreciation of the way the law actually operates upon disadvantaged populations will take the place, in some minds, of instruction in legal history[46].

Law students cannot be taught everything. Discernment is necessary. Selectivity is required. Optional courses are appropriate. A return to the notion that legal history is a compulsory core subject now has many opponents. In the past, the teaching of legal history has had its ups and downs. If in recent decades it has been all down, this presumably is a response to the market. To some extent, at least, it reflects at belief amongst law schools, their teachers and their students that legal history is not a subject vital for the purposes for which the study of law is directed[47].

IT MATTERS A LOT

Conceding that there are elements of truth in of the foregoing estimates, it is my view that the almost total abandonment of the teaching of legal history in Australian law schools is a most undesirable,

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[46] R E McGarvie, "The Function of a Degree: Core Subjects", unpublished paper for Law Council of Australia, Bond Uni, 14 February 1991, 6. See also R E McGarvie, "Legal Education: Pulling its Weight in the 1990s and Beyond" (1991) 17 *Monash Uni L Rev* 1 at 6.

[47] E W Raack, "Some Reflections on the Role of Legal History and Legal Education", 26 *Duquesne Law Rev* 893 at 894 (1988).

even shocking, development. It is one that needs to be turned around[48]. However, the answer is not to revive the old-fashioned core curriculum that included a subject of legal history addressed to the Plantagenets, the old forms of action and the legal relics that threaten to "rule us from their graves"[49].

It may be that the restoration of a compulsory subject in legal history for legal training in the twenty-first century could not be justified. After all, there are lawyers, who know from the start, that they will spend their lives in the unpleasant intricacies of State planning legislation or, equally irksome, the detailed provisions of the *Income Tax Assessment Act*. Yet to deny virtually every law student in this nation an exposure to useful, interesting and relevant knowledge about legal history, because no course in that subject is offered, seems very unfortunate. Especially so because the sources of Australian legal history are now readily available and can bring home to the student the high relevance of what has gone before in understanding where we have arrived and where we are likely to proceed.

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48 cf J C Sheahan, "Use and Misuse of Legal History: Case Studies from the Law of Contract, Tort and Restitution" (1998) 16 *Australian Bar Review* 280 at 296.

49 F Maitland, cited by W S Holdsworth, *Some Lessons from our Legal History,* Macmillan, New York, 1928, 7.

It remains true, as Santayana remarked to the Americans, that the failure to know one's history inevitably leads to a repetition of its errors[50]. Law is not itself history. But it can often not be fully understood without perceiving its rules in context, whether those rules are stated in statutory form or expressed in judicial opinions. One of the great changes in the past thirty years of judicial decisions in Australia, as in Britain and elsewhere, has been an appreciation of the importance of context to an understanding of the commands of the law, whether parliamentary, bureaucratic or judicial. So history is a vital ingredient for the legal context, whether the law in question is expressed in the Constitution, in statutory texts or in the decisions of the judges[51].

There is no need today to see a study of legal history as something alien to an appreciation of law as a social construct. As Professor Castles constantly observed, the law is a part of living history. Necessarily, it reflects social values. To understand the content of the law, and to appreciate what law is getting at, it is no longer acceptable to take meaning from disembodied words, viewed in isolation. In particular, legal history provides what Justice McGarvie described in his report as "navigational aids" for the contemporary lawyer. Without a full understanding of the law's history and that of its institutions, the

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50 M H Hoeflich, "A Renaissance in Legal History?", *Uni Illinois Law Rev* 507 (1984).

51 Athaide, above n 21, at 114.

practitioner will often lack a reliable compass and, as a result, risk reckless navigation[52].

Even a statute such as the *Income Tax Assessment Act* cannot be understood without some knowledge of legal history; an appreciation of the property concepts that are expressed; and an understanding of where the very notion of legal rights and property interests derive from.

Legal history thus gives a concrete understanding to many of the philosophical questions that are presented by the law. Jurisprudence and legal values provide the lawyer-in-training with the tools to perceive and ask the important philosophical questions concerning the point of the entire legal exercise. But even this is in decline. Almost as many law schools in Australia as fail to teach legal history now offer little, if any, instruction in jurisprudence or legal values. Fifty years ago this too was a compulsory subject. But if the philosophising of jurisprudence is often difficult for law students, who doubt its utility and see it as an overload of useless "culture", history can often help to concretise such questions. By explaining the events of the struggle between Charles I and the English Parliament, for example, important lessons can be taught concerning the foundational assumptions that are implicit in the Australian Constitution and in the fundamental purposes of constitutionalism itself.

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52 McGarvie (Bond), above n 46, 6.

Assuming that it might be possible to teach the history of the law of torts, of contracts and of personal property in special courses for that purpose, there is still, surely, an imperative to teach the history of the emergence of lawmaking institutions, and especially of the constitutional history under which we are governed. My own view is that Dr Currey was right in his perspective. The history of our legal institutions is an essential part of humanity's narrative of liberty. If future lawyers (including those who become judges) have no real grounding and understanding in that story, how can we expect them to respect, uphold and defend liberty when it comes under the inevitable pressures of the modern state? If young lawyers are not taught the famous events that are assumed and not stated in the text of the Australian Constitution, they may make grievous mistakes in years to come[53]. Indeed, it is easy enough for such mistakes to be made today by those who underwent compulsory courses in legal history half a century ago. Perhaps the intervening decades have eroded the collective recollection or appreciation of the assumptions inherent in the Australian Constitution.

With all respect to those of a differing view, recent cases of high constitutional importance have sometimes illustrated a failure to appreciate critical lessons in the story of liberty as it is now enshrined in the Australian constitutional text:

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[53] Cf M Crackanthorpe, "The Uses of Legal History" (1896) 12 *Law Quarterly Review* 337 at 339.

- Thus, *Combet v The Commonwealth*[54] was a case concerning political advertising, decided in 2005. The challenger invoked the history of earlier English parliamentary developments which, he said, were reflected or assumed in the language of the Australian Constitution: assuring a power in each House of our Federal Parliament to scrutinise and approve appropriations of government expenditure proposed by the Executive Government, judged by a high measure of specificity so as to make the scrutiny useful for its essential democratic purpose. Without an appreciation of that history, it was easy enough to misunderstand, or under-value, the language of the constitutional text[55];
- Similarly, in *New South Wales v The Commonwealth*[56] (the *Work Choices* case)[57], the High Court was called upon to decide the power afforded to the Federal Parliament by s 51(xxxv) of the Constitution to resolve industrial disputes by conciliation and arbitration and also the power to make laws with respect to defined "corporations" in s 51(xx). Without a knowledge of the history, and high ideals, concerning the independent resolution of

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54 (2005) 224 CLR 494.

55 cf (2005) 224 CLR 494 at 597-601 [232]-[247] referring to British, Australian, New Zealand and other parliamentary practice and constitutional history.

56 (2006) 229 CLR 1.

57 cf (2006) 229 CLR 1 at 185-191 [432]-[447], 216-221 [519]-[530].

industrial disputes by independent arbitrators, it was easy enough to sweep that power away or to neuter it, despite its hugely important contributions to social equity in the history of the Australian Commonwealth. The result, when this was done by greatly expanding the ambit of the corporations power, was, in my view, a great wound to the federal balance and to the protection of the industrial 'fair go' in Australia. Most important activities in society today are performed by corporations, public or private. Riding such a camel-train through the federal charter was manifestly *not* what the Commonwealth historically was intended to do. We have largely lost our link with, and appreciation of, the spirit of federalism. We have done so at the very time when the federal division of powers may be more important for our liberties than ever. And we have removed a long understood protection for industrial justice that will probably now never be restored; and

- In *White v Director of Military Prosecutions*[58], a question arose concerning the role of military tribunals under the Australian Constitution. The resolution of that question took the High Court back to the famous story of the insistence of the English Parliament against the claims of the prerogatives of the Crown, that members of the military forces in England were accountable to the general courts. This was an obligation demanded after the abuses of the Cromwellian Commonwealth and military rule in

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[58] (2007) 231 CLR 570.

> England. It assured a completely different relationship between the military in the British constitutional tradition from that which has prevailed in other European societies. We in Australia are heirs to that strong civilian tradition. It is, at once, a protection of the rights of military personnel in our society who are themselves citizens and a protection of other citizens from military exclusivism.[59] Yet these lessons of history were not, in my opinion, given their correct weight in *White's case*. The result was an ahistorical reading of our Constitution and of its express or implicit requirements.

Do not tell me that the Plantagenets matter not to us in Australia. Or that the clanking chains of English legal history can be ignored by contemporary Australian lawyers. For Dr Currey and for me, our constitutional arrangements are still deeply affected by the story of liberty that preceded the establishment of the convict settlement at Farm Cove in 1788 and all that followed including the formation of the Commonwealth in 1901. There are many other fields of law that are affected by history, not least the brilliant invention of the corporation which is itself a creature, like so much else in the law, of legal history. It

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59 cf (2007) 231 CLR 570 at 621-625 [142]. Referring to British, United States and Indian constitutional law and practice at 625-626 [143]-[148]. See also *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 570 and *Re Colonel Aird; Ex parte Alpert* (2004) 220 CLR 308 at 340-344 [101]-[113] where some "lessons of constitutional history" are recounted by reference to earlier decisions. See also G Fryberg, "Military Commissions: Should Australia have some?" (2008) 82 ALJ 636 and *Boumediene v Bush* 553 US 1 (2008) per Kennedy J.

is essential to the success of our economy and is its inventive vehicle of risk-taking.[60]

It was Oliver Wendell Holmes Jr who pointed out that "repose is not the destiny of man".[61] So history is always continuing in the law. It never ceases. But one of the chief lessons of legal history is the discovery that human beings can make law to govern the conduct of each other.[62] Once we realise that, we are burdened with the obligation to ensure that such laws are clearly prescribed; reasonably implemented; and rational in their content and application. Some law students at least (hopefully especially those who will become lawmakers as judges and public officials in the future) need to learn these basic lessons. At the very minimum, instruction in the core history of our constitutional institutions is essential to their ongoing successful operation. As citizens we should all be concerned about the deficit in teaching legal history to future Australian lawyers.

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60 Cf A W B Simpson, "Legal Education and Legal History" (1991) 11 *Oxford Journal of Legal Studies No 1,* 106 at 111.

61 Quoted S B Presser, "'Legal History; or the History of Law: A Primer on Bringing the Law's Past into the Present", 35 *Vancerbilt Law Rev* 849 at 890. "The Path of the Law", 10 *Harvard Law Rev* 457 and 478 (1897).

62 Professor Daniel Boorstein, "A Teacher's After Thoughts. In Defense of Legal History", 4 *Journal of Southern Legal History* 154 (1996) at 154.

WHAT IS TO BE DONE?

I am not calling for the restoration of the "good old days". I do not demand compulsory subjects that may exclude the opportunities for choice that reflect the special interests of the contemporary law student. But we have to do better in Australia than the situation revealed in the responses of the 31 law schools of this nation about the teaching of legal history to the next generation of lawyers.

By all means, it was necessary to change the former ways of doing things. In today's world, no doubt, C H Currey's perspective of legal history might be seen as outdated as the dinosaur. We needed to abandon a purely English legal history approach; but not to abandon the teaching of English legal history which is in part our own. We now certainly need to introduce the teaching of basic information about world legal history.[63] To some extent, in Commonwealth countries, we have never been as cut off from the world as, say, United States lawyers have been. The Commonwealth itself is a kind of comparative law workshop. We are linked within it by commonalities of language, legal tradition, professional connection, trade and culture.[64] But all lawyers today need to be aware of the enormous growth of international and regional law, including the international law of human rights.

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[63] D A Funk, **"**World Legal History Needs You**",** 37 *J Legal Education* 598 (1987). D A Funk "Introducing World Legal History: Why and How? " 18 *Toledo L Rev* 723 (1987).

[64] The United States position is described in Funk, *ibid*, 603.

Evidence that this knowledge is becoming more important may be found in many cases, including the recent decision of the High Court in the prisoners' voting case, *Roach v Electoral Commissioner*.[65] There, the High Court referred to, and utilised, human rights developments affecting prisoners in judicial decisions in Canada and in the European Court of Human Rights.[66] Despite some rear-guard opposition[67], our legal history today has expanded into a global and regional dimension. This is an expansion that will continue and affect our perception of law and its contemporary features.

Various suggestions have been made of what precisely needs to be done to restore specific courses in legal history and to graft onto other courses an historical component - especially in constitutional, public and institutional law. The suggestions range from the simplistic proposal to spend more money on legal education, and specifically education in legal history; to endeavour to make legal history less dry and dusty (one author has suggested teaching it backwards[68]); to teaching legal history by reference to institutions and the values they

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65 (2007) 81 ALJR 1830.

66 Referring to *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 and *Hirst v United Kingdom* (2005) 42 EHRR 41.

67 See eg *Al-Kateb v Godwin* (2004) 219 CLR 562 at 586-595 [49]-[74] per McHugh J; cf 615-630 [145]-[192] of my own reasons.

68 M S Mason, "On Teaching Legal History Backwards", 19 *Journal Legal Education, 155* (1966).

have pursued. All this would surely be more interesting and relevant to the students of today than teaching by rote the names of famous dead English white men.

Professor Woodard has exclaimed (paraphrasing Holmes) that "three generations of analysts is enough". The future function of legal history should be to synthesise experience and to emphasise the truly vital events and personalities who have contributed to the unfolding story of liberty in Australia. If Edward Gibbon in his history of *The Decline and Fall of Roman Empire*, could tell the entire story of Roman law in a single chapter, we could perhaps hope, by great efficiency, to get the essential messages of our legal history over in shorter time than once was done.[69] Thanks to Alex Castles, John Bennett, Bruce Kersher and other fine Australian scholars of legal history, we now have the texts and the source materials. Increasingly, these are being placed on the internet. It is fascinating to access an ancient case of once living people whose struggles and conflicts afford us resonances of our own age, years and even hundreds of years on.

The changing demographic of Australian society means that the story of the English struggle for liberty is not the only such story that we need to tell, vital though it still is to our institutions[70]. There are other

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[69] Petrow, above n 21.

[70] See Nicholson, "The Challenges of Teaching Legal History to a Demographically Diverse and Educationally Under-Prepared Student Body" (2004) 11 *Monash University Electronic Journal of*

Footnote continues

stories and perspectives, including (as the 2008 National Apology to the indigenous peoples acknowledges) the story of our Aboriginal and Torres Strait Islanders for whom Australian law has not always been a protector and a liberator.

This is not the time, nor am I the expert, to identify precisely what needs to be done. But the sorry situation that we have reached in the teaching of legal history in Australian law schools clearly demands an energetic response. Otherwise ignorance of our history will lead us into error. Error will divert us from the path of liberty. It will encourage insensitivity to minorities. It will occasion the repetition of historical mistakes.

The problem identified in this lecture is by no means confined to the teaching of law, still less teaching law students legal history. In a sense, it is one that confronts modern electronic societies as a whole. According to a recent survey by the Washington-based Pew Center for the People and the Press, only 28% of Americans (down 54% on August 2007) knew that some 4,000 United States soldiers had been killed in Iraq War since the commencement of that conflict in 2003. In a culture of distraction, increasing numbers of people cannot remember what they knew only a year ago. Much less do they recall what happened five

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Law (No 4) (visited 21 July 2008). See also G Edward White, "Some Observations on a Course in Legal History", 20th *Journal of Legal Education* 440 at 443 (1971).

years ago. Less still do they now know what happened in earlier decades and centuries, if they ever knew it. Most do not care.

Quoting Ralph Waldo Emerson in his speech at Harvard in 1837, known as the "American Scholar" oration, Susan Jacoby has observed that there was truth in the declaration that "the mind of this country, taught to aim at low objects, eats upon itself". Jacoby contends that "this line resonates even more strongly today, when the low objects are purveyed along an infotainment highway that fragments memory and encourages confusion between information and the genuine framework of knowledge essential to turning isolated facts (and errors) in a reasoned civic dialogue"[71].

History in itself is fascinating, being the story of the human condition and the emergence of our species to what we hope is, and will be, a higher plane of peace and security, economic equity and respect for fundamental rights. History has an important legal component. That is why a life in the law can never be far from history. I hope that in these remarks, which I dedicate to Geoffrey Bolton, I will enliven a new concern amongst those with the power of action to rekindle the teaching of legal history in Australia. The decline and fall has gone far enough. It must be stopped. We have no time to lose. We have been warned.

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[71] S Jacoby, "Reading on the Web is not really reading" in *The Spectator*, 30 August 2008, 18 at 19. Ms Jacobey is the author of *The Age of American Unreason*, Old Street Publishing, 2008.

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IS LEGAL HISTORY NOW ANCIENT HISTORY?

The Hon Justice Michael Kirby AC CMG