

LEGAL HISTORY MATTERS: FROM MAGNA CARTA TO THE CLINTON IMPEACHMENT (MELBOURNE UNIVERSITY PRESS, 2020) ISBN 9780522877137 PAPERBACK, 243 PP

EDITED BY AMANDA WHITING AND ANN O'CONNELL

Legal history is sometimes seen, to quote William Wordsworth, as little more than the study of 'old, unhappy, far-off things'.¹ Paul Finn recently observed that legal history has, 'for the most part, ... been marginalised to the point of near extinction'.² To which he quite correctly adds that '[t]his is more than a matter for regret. It impoverished our legal imagination.'³ At least from a superficial analysis, the absence of legal history on the curricula of most Australian law schools reveals a similarly bleak picture of the subject.⁴ Other evidence points in a more positive direction,⁵ and reports of the death of legal history may have been exaggerated after all. For a few decades now, the High Court of Australia has drawn freely on English historical case law and legal treatises in a range of private law areas. Paradoxically, these judges have used the past intending to create a distinctly Australian private law. In many of these decisions, old English equitable principles have been prominent. Examples include extending the doctrine of penalties beyond cases of breach of contract,⁶ and attempts to sideline unjust enrichment to explain restitutionary liability.⁷ On this evidence alone, it is not very difficult to find a decidedly utilitarian justification for the study of legal history.

There are some significant challenges in teaching legal history to modern students. Speaking in generalities, the biggest of these is their ignorance. It is not so much that students do not possess much detail of legal history — this is to be expected — but rather that they lack a feel for the dynamics of history and societal change, which makes teaching the subject difficult. There is often little sense of how different the world was in 1200, 1400, 1800 or even 1950. Part of the challenge

¹ William Wordsworth, 'The Solitary Reaper' (poem, first published 1807).

² PD Finn, 'Foreword' in Justin T Gleeson, JA Watson and Ruth CA Higgins (eds), *Historical Foundations of Australian Law — Volume I: Institutions, Concepts and Personalities* (Federation Press, 2013) v.

³ Ibid.

⁴ Amanda Whiting and Ann O'Connell, *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melborne University Press, 2020) 2–3.

⁵ Ibid 1, 5.

⁶ *Andrews v Australian and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

⁷ *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

is overcoming a reluctance to engage with the primary sources. Whiting and O'Connell suggest that one way of making the study of legal history a more meaningful exercise is for 'students to undertake an extended piece of legal history research and writing, so that they can take the necessary time to develop historical research skills while also deepening their understanding of the legal matter under investigation'.⁸ The essays in this volume are the fruits of that approach.

As with any edited collection, some chapters will appeal to some readers more than others. This volume cannot be said to lack variety. It is nevertheless a shame that none of the chapters deal with the history of private law, which is a difficult but rewarding area of study. As it is, the subjects range from Anne Boleyn to Bill Clinton. Although there is no common thread to the essays, there are some prominent unifying themes. The first of these is Magna Carta. Matthew Psycharis looks at the position of Magna Carta in the Reformation.⁹ He concludes that 'the Charter had an influential role to play in the development of English law in the period of 1520–60'.¹⁰ Since this chapter was written, this hitherto unexplored period as far as Magna Carta is concerned has been considered in detail by the foremost English legal historian, Sir John Baker.¹¹ Psycharis, who is rightly careful not to claim too much, raises some interesting questions, especially around the role that the Charter may have played in developing ideas of precedent. In the second contribution on Magna Carta, Phoebe Williams considers the 19th-century repeal of large parts of the Charter and at the same time the way that it was used as an idealised 'symbol of England's glorious past' by some of those who advocated law reform.¹²

A second theme — and one that encompasses most of the chapters in the volume — focuses on criminal trials of various kinds. The trials discussed had wider consequences beyond the individual defendants, and the authors do a good job in putting them into context. In 'Due Process of Judicial Murder?', Lisette Stevens looks at the trial of Anne Boleyn.¹³ Having carefully considered the conduct of other treason trials of the period, she concludes that 'Anne's trial was anomalous and unfair even by contemporary standards'.¹⁴ The suffragettes and the 'Rush the Commons' trial are the subject of Alexandra Harrison-Ichlov's

⁸ Whiting and O'Connell (n 4) 7.

⁹ Matthew Psycharis, 'Meeting More's Challenge: How the *Magna Carta* Helped Build a Robust *Lex Anglicana*' in Whiting and O'Connell (n 4) ch 1.

¹⁰ *Ibid* 12.

¹¹ Sir John Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge University Press, 2017).

¹² Phoebe Williams, 'A Nineteenth-Century View of the Magna Carta' in Whiting and O'Connell (n 4) ch 3, 81.

¹³ Lisette Stevens, 'Due Process of Judicial Murder?' in Whiting and O'Connell (n 4) ch 2.

¹⁴ *Ibid* 43.

chapter.¹⁵ She shows that if the government planned to use the prosecution to suppress the suffragettes, they merely succeeded in giving the movement valuable publicity for their cause. Another prosecution, that of Isaac Harris and Max Blanck for manslaughter of their employees killed in a factory fire, also helped bring about beneficial changes and is considered in Jack Townsend's chapter.¹⁶ Although the defendants were acquitted, this trial, along with similar incidents, helped to promote the case for greater worker protection. However, one can surely only read Townsend's comment, that 'Harris and Blanck were opportunistic profiteers who took advantage of laissez-faire political and economic order to maximise profits at the expense of their workers', and think, especially in the context of the garment industry now largely based in Asia, *plus ça change, plus c'est la même chose*.

Two other American defendants are more likely to divide opinion than Harris and Blanck. Samuel O'Connor argues that the trial and conviction of Alger Hiss for perjury was 'the necessary catalyst for the paranoid worldview that would come to characterise a certain element of the American right'.¹⁷ Undoubtedly, Nixon used Hiss to make a name for himself and to promote an anti-Communist agenda.¹⁸ Well-healed Liberals never forgave Nixon for the pursuit of one of their own. If anything, recent evidence points more clearly to the fact that Hiss was in fact a spy rather than an innocent. Nixon is not the first or the last objectionable individual to succeed in getting himself elected President. The attempt to impeach Bill Clinton is discussed by Katherine Kilroy.¹⁹ She concludes that there are lessons in the affair for future attempts at impeachment, observing that Clinton largely retained public support, as well as crucially that of fellow Democrats, even if there was a credible case against him. Kilroy also speculates that modern millennials would be much less forgiving of Clinton's predatory sexual behavior. Perhaps the irony here is that, despite the cost and length of the impeachment proceedings, there remain many unanswered questions about both the Clintons. These are chronicled in all their appalling technicolor squalor by the brilliant and fearless Christopher Hitchens.²⁰

¹⁵ Alexandra Harrison-Ichlov, 'A Symbol, a Safeguard, an Instrument: Reflections on the 1908 "Rush the Commons" Trial and the Campaign for Women's Suffrage in Early Twentieth-Century England' in Whiting and O'Connell (n 4) ch 6.

¹⁶ Jack Townsend, 'The People of the State of New York v Isaac Harris and Max Blanck: Putting Capitalism on Trial' in Whiting and O'Connell (n 4) ch 7.

¹⁷ Samuel O'Connor, 'Alger Hiss as Cipher: The Political and Historical Legacy of the Hiss Case' in Whiting and O'Connell (n 4) ch 4, 100.

¹⁸ John A Farrell, *Richard Nixon The Life* (Scribe Melbourne, 2017) 111–28.

¹⁹ Katharine Kilroy, 'Campaigning for a Verdict: Politics, Partisanship and the President on Trial' in Whiting and O'Connell (n 4) ch 9.

²⁰ Christopher Hitchens, *No One Left to Lie To* (Allen & Unwin, 2012).

It is perhaps unfair to single out two chapters for special praise when a number in the volume would not look out of place in an edited collection of professional legal historians. Xavier Nicolo's chapter on the rebellion of miners in the Ballarat goldfield in 'Guilty of Sedition but Innocent of Treason' makes excellent use of court transcripts to explore the important differences between prosecutions for sedition and treason.²¹ Sedition is also considered by Simon Pickering.²² His subject, Brian Cooper, was a lowly official in the Australian Administration in New Guinea. Remarks he supposedly made about Robert Menzies and his government and in favour of independence resulted in a prosecution. No one comes out of this story very well — not ASIO, not Menzies, and perhaps more surprisingly not Chief Justice Dixon, when the case finally reached the High Court. Pickering makes good use of ASIO files in the National Archives. Cooper unlike Hiss had no influential friends, but one can only conclude that his prosecution was much less warranted. These and the other chapters show that legal history can be an exciting and relevant subject for students to study. It does — in the pun of the books title — matter.

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²¹ Xavier Nicolo, 'Guilty of Sedition, but Innocent of Treason: The Aftermath of the Eureka Stockade' in Whiting and O'Connell (n 4) ch 5.

²² Simon Pickering, 'A Voice in the Wilderness: Revisiting the Political Trial of Brian Cooper' in Whiting and O'Connell (n 4) ch 8.