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***RIGHTS AND REDEMPTION:
HISTORY, LAW AND INDIGENOUS PEOPLE***

**By Ann Curthoys, Ann Genovese and Alexander Reilly
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As legal scholars and professionals, we are fascinated with the legal reasoning of the judiciary, who is on the bench and how the legislature responds to judicial reasoning. The factual matrix for case law is often something that is in the background, to provide a bit of a story and maybe create some public interest in what we do. Facts are relevant when they are applied to distinguish or narrow precedent. In those cases, the facts are mostly taken for granted and not questioned by those analysing the law.

However, for Indigenous litigants facts can be one of the most contested issues in a case, from the original claim to the highest levels of judicial appeal. The facts are often construed with historical-political assumptions and particular cultural meaning. This is glaringly obvious in native title cases where there are disputes on the Indigenous person's use of the land, whether the use is in accordance with the traditional laws and customs and whether the use has been continuous since colonisation. However, the significance of factual interpretation also arises in a range of cases that seek legal remedies for Indigenous peoples' historical dispossession and discrimination.

Curthoys, Genovese and Reilly's exciting new book, *Rights and Redemption: History, Law and Indigenous People*, analyses the treatment of historical facts by Australian courts when Indigenous litigants are involved. The book attempts to bridge the gap between historians and the judiciary by clarifying mutual misconceptions of each other's discipline and considering how a meaningful account of the past can be constructed in Indigenous case law. In doing so, the authors — who are located in the Law and History disciplines — unpack the tensions and distrust between Law and History.

Fundamental to the tension between Law and History is that lawyers and judges often perceive historians' skills as superfluous to the legal professionals' own interpretation of historical facts. At the same time, historians frequently view the legal profession as simplifying historical facts for a value-laden purpose. Some historians object to the adversarial process that requires them to produce evidence

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of historical facts for one side alone, as it precludes a holistic historical approach (p 81). The authors quote FW Maitland who in the late nineteenth century stated ‘what the lawyer wants is authority and the newer the better, what the historian wants is evidence, and the older the better’ (p 140).

Rights and Redemption draws on key litigation relating to land claims and native title, Indigenous identity, the Stolen Generations and heritage. The authors also include material from interviews they conducted on the law/history relationship with litigants, expert historians, lawyers and trial judges. This book begins by tracing the first, unsuccessful land claim in 1971 (*Milirrpum v Nabalco*) where anthropological evidence did not feature in the judgment. Accordingly, Justice Blackburn privileged the established legal position that ‘Aboriginal people had no proprietary common law claims to land over Yolngu peoples’ (p 4). The authors point to the dramatic shift under the *Aboriginal Land Rights (Northern Territory) Act 1976* that required proof of ‘traditional ownership’. Claims under the Act would rely not only on oral and documentary history, but also on anthropologists’ observations of Indigenous people’s ongoing cultural practices.

According to the authors, the tide shifted again in the 1980s and 1990s when historians were highly significant in public debate over Indigenous rights and non-Indigenous responsibilities (pp 44–45). Courts and their claim-making processes were also part of this battlefield over Indigenous rights and essentially national identity (p 220). This marked the beginning of courts’ engagement with historians. The reliance on historians reached a high point in *Mabo v Queensland No 2* (1992) (p 50). While native title litigation helped cement historians’ credentials as court experts, which the authors detail in Chapter 3, it was not without challenges. Anthropological evidence was often treated as more real and there was an ongoing need for courts to engage in a critical and reflective assessment of historical facts (p 85). This was apparent in *Yorta Yorta v Victoria* (2002) where evidence of continuous connections to land, put by historians on behalf of claimants, was interpreted narrowly by the courts (p 68).

However, even where native title claimants or Indigenous litigants more generally have not been successful due to the colonial burden extinguishing native title or judicial findings that unjust policies were nonetheless legal, the authors point to the redemptive power of claimants’ histories being told in courts (p 106). The authors convey a number of redemptive features of the court process for Indigenous people:

Redemption is in the strength gained through mounting a claim, in the growth of understanding of judges, in the discursive responses to failure in cases ... and in the maturing relationship between law and history. (p 230)

This theme is developed in chapters four to eight that discuss litigation involving *inter alia* genocide matters, heritage laws and Indigenous identity. In chapter 6 on the stolen generations’ claims, Lorna Cubillo and Peter Gunner’s claim is discussed at length to reveal that:

Although the claims were about the application of narrow legal principles to the experiences of two individuals, they signified a larger moral and political story: the racial basis for, and the devastating consequences of, past practices of child removal. (p 135)

Cubillo and Gunner v Commonwealth of Australia (2000) was not only about gaining compensation for loss they endured from their forcible removal from family, but it was also a stage for the applicants to tell their history and give sound to their lost voices. The claim ultimately failed in the Federal Court of Australia. In part this was due, according to the authors, to a restricted approach to the historical record. The authors assert that the evidence was assessed on ‘contemporaneous standards’ rather than ‘filtered through Indigenous experience lived in the present’ (p 136). Justice O’Loughlin afforded little value to Cubillo and Gunner’s ‘redemptive Indigenous history’ in the ‘hierarchy of forms of evidence’ that privileged contemporaneous archival sources (p 146). Historians’ expert opinion was viewed as subjective and not put in the same class of expertise provided by psychologists and medical practitioners (pp 157–160).

Rights and Redemption also considers *Trevorrow v The State of South Australia* (2007), where Bruce Trevorrow as a member of the stolen generations was awarded compensation by the Supreme Court of South Australia. The authors contrast this judgment with the unsuccessful Cubillo and Gunner litigation and highlight the availability of archival documents for Trevorrow, including the departmental medical records. The authors note that Justice Gray presents the psychology expert as ‘objective’, even though her critical approach, skills and methodology ‘resonate with historians’. Thus, the courts are willing to use ‘reflexive and contextual historical evidence if it looks like science’ but not where it ‘encroach[es] on the territory of legal history’ (p 159).

Curthoys, Genovese and Reilly put a case for compromise, collaboration and communication between historians and legal professionals. To achieve this goal, the authors urge lawyers ‘to be clearer about what they want from their experts’, particularly historians (p 224). At the same time, they argue that expert historians ‘must be prepared to work within the constraints of the adversarial trial’ and ‘to accept the more formalist requirements that current case law indicates is essential for the acceptance of their reports’ (p 224).

The authors admit that the ‘maturation’ that has taken place in the courts’ engagement with historians has not led to ‘a greater prospect of success for Indigenous claimants’ (p 226). The value of redemption, therefore, appears marginal if not meaningless. Any redemptive power of the court process is at least partially lost in the non-recognition of rights or failure to grant legal remedies. Such outcomes arise not only from a lack of collaboration between the Law and History professions, but also from the procedural obstacles under the *Evidence Act* and the substantive barriers in laws such as the *Native Title Act*.

The authors also do not consider sufficiently that litigation — especially for Indigenous people outside of the ‘test’ case situations that are cited in the book — can alienate Indigenous parties and open old wounds in a threatening environment. This process is all the more damaging when there is no beneficial legal outcome. If there are benefits in the development of a public record from claim-making, this may be better achieved in truth-telling commissions or compensation tribunals.

Nonetheless, *Rights and Redemption* makes a powerful case for the importance of historians’ expertise in cases involving Indigenous litigants. The authors reveal that historical facts can determine the outcome of such cases, and a contextual understanding of these facts will help ensure that just outcomes parallel the redemptive process for litigants. At the same time, the courts’ role in providing a public record of the historical narrative, including exposing injustice toward Indigenous people, will be enhanced through critical engagement with expert historians.