*Greg Taylor**

LEGAL HISTORY MATTERS: FROM MAGNA CARTA *TO THE CLINTON IMPEACHMENT*

EDITED BY AMANDA WHITING AND ANN O'CONNELL
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This is an unusual collection of essays — and perhaps also one that poses more than the usual difficulties for the reviewer — but a collection that is to be welcomed.

Rather than the standard collection of learned essays by established scholars on a single theme, *Legal History Matters: From* Magna Carta *to the Clinton Impeachment*[1] consists of nine essays on a large variety of topics in legal history written by Juris Doctor ('JD') students from Melbourne Law School (one of whom I made the acquaintance of some years ago when she was my research assistant), along with a short but thought-provoking foreword by the Hon Julie Dodds-Streeton and an introduction by the editors Amanda Whiting and Ann O'Connell. Four of the essays concentrate on English legal history: a discussion of how *Magna Carta* assisted in the development of English law in the 16th century;[2] a consideration of the trial of Anne Boleyn;[3] a discussion of the reasons behind the repeal of various parts of *Magna Carta* in the 19th century and its place in the legal reforms of that important

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1 Amanda Whiting and Ann O'Connell, *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020).

2 Matthew Psycharis, 'Meeting More's Challenge: How the *Magna Carta* Helped Build a Robust *Lex Anglicana*' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020) 11.

3 Lisette Stevens, 'Due Process or Judicial Murder?: Anne Boleyn's Trial Placed in Context' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020) 42.

and often underestimated era;[4] and, finally, a look at aspects of the suffragette trials of the early 20th century.[5] Two Australian topics are featured: the Eureka trials[6] and the trial for sedition of a young colonial official in New Guinea in the early 1960s.[7] In three essays, the authors have branched into American legal history with contributions on Alger Hiss,[8] the manslaughter trial of two factory operators after a fire in 1911 in New York[9] and the impeachment of President Bill Clinton.[10]

Melbourne Law School, the editors and the publishers are all to be commended for the effort and risk they have taken upon themselves in publishing this student work (without any sign of sponsorship by an outside body such as a law firm). Now, I cannot speak for Melbourne Law School, but certainly in many law schools today there is a very long tail of students whose aptitude for and interest in the law appears minimal to non-existent. It is not merely a matter of hoping for the greatest possible return for the minimum effort, for that is the natural human condition that afflicts everyone, but greater deficiencies which cannot be analysed in detail here. This situation means, however, that it is often the least able students who occupy most of the time available to their teachers, while the very able are left to fend for themselves — a task which they can usually discharge quite well on the essential plane of getting through the

4 Phoebe Williams, 'A Nineteenth-Century View of the *Magna Carta*' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020) 65.

5 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 Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020) 137.

6 Xavier Nicolo, 'Guilty of Sedition, but Innocent of Treason: The Aftermath of the Eureka Stockade' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020) 112.

7 Simon Pickering, 'A Voice in the Wilderness: Revisiting the Political Trial of Brian Cooper' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020) 187.

8 Samuel O'Connor, 'Alger Hiss as Cipher: The Political and Historical Legacy of the Hiss Case' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Press, 2020) 87. Alger Hiss was the subject of controversial accusations of espionage in the McCarthyist era.

9 Jack Townsend, 'The People of the State of New York v Isaac Harris and Max Blank: Putting Capitalism on Trial' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Press, 2020) 164.

10 Katharine Kilroy, 'Campaigning for a Verdict: Politics, Partisanship and the President on Trial' in Amanda Whiting and Ann O'Connell (eds), *Legal History Matters: From* Magna Carta *to the Clinton Impeachment* (Melbourne University Publishing, 2020) 214.

law course, but without special attention from academic staff which might further encourage them to make use of and extend their abilities. For this reason, I founded the High Achievers' Programme when at Monash University — to ensure that sufficient attention was directed to the needs of the best students. This book serves, among others, the same aim.

This book pursues a further aim that is dear to my heart, namely, the encouragement of publication by the very top law students. I am the proud 'midwife' of at least three student publications in top-ranking journals and see this activity, among other things, as negating the injustice occasioned by the failure of my own similar attempt to appear in print in this very journal when an undergraduate, owing to the lack of interest shown by academic staff of the era and a certain celebrated legal historian in particular. Such episodes are seared in my mind, as is perhaps every setback in youth, and it is only recently that the wound from nearly three decades earlier healed sufficiently for the piece in question to be dusted off, updated and finally published in a leading journal. Conversely, the students who are the beneficiaries of this work will be rightly pleased and proud to see their names attached to pieces of legal scholarship produced by a leading publisher, and I hope that one or other of them may be encouraged to consider a career in the academy. They have not been subjected to the chief abiding frustration of the young adult: not being taken seriously. It is to the great credit of the two editors that they have not taken the easy path of indolence but rather invested the time, for what is probably minimal reward in terms of publication lists and promotion prospects and so on, to encourage and celebrate the work of their leading students and ensure that their small but worthy research contributions to legal history are not lost forever. I also hope that volumes such as that under review may appear every half-dozen or dozen years or so, that future teachers at Melbourne Law School will be encouraged by this example, and indeed that it spreads to further institutions.

It will be apparent, given the list of topics dealt with in the nine essays described earlier, that it would perhaps be beyond the capacity of even the most learned legal historian to review each of these essays in detail given their broad temporal and geographical scope, and if I do not mention one or other of them specifically below, the fault lies with me and the limitations of my expertise. It must however be said that the narrow selection of countries is a disappointment that applies to the overall collection rather than any one particular contribution. Not only is there nothing outside the English-speaking countries, which is explicable by the need for a researcher to have excellent language skills and often also the time and resources to travel to distant archives; there is nothing from our near neighbours in New Zealand, whose legal history offers an enormous field for research, or from our Commonwealth cousins in Canada. Only the New Guinea sedition trial, conducted of course under Australian colonial rule and culminating in an appeal to the High Court of Australia, adds some diversity to this mixture.[11] Another noticeable gap is any consideration of the history of the private law: all of the essays are on some aspect of public or criminal law.

11 Pickering (n 7).

The editors could, needless to say, select only from what was available to them, and they have managed to rescue nine excellent examples of student work from the oblivion that would otherwise have been their fate. Most of the essays are quite detailed: five of the nine take as their text a single trial and analyse it.[12] This too is easily understood given the practical limitations faced by the authors, and certainly such detailed considerations of single incidents can make substantial contributions to legal history. It is the absence of such detailed accounts that can often doom any attempt to write a more general legal history of a particular country or time.[13] Nevertheless, the contribution relating to the New Guinea sedition trial, for example, would have benefited by a longer consideration of what can be concluded from it for today's law and any need for law reform, matters which are only touched upon at the end of the chapter in question. Generally speaking the essays do not betray their authors' neophyte status: only in the Eureka Stockade chapter[14] do I miss the realisation that the formal and stately language of the indictments was not at all remarkable before the reforms effected by the *Indictments Act 1915* (UK) and its Australian counterparts.[15] Similarly, I was briefly wrong-footed by a reference to a 'Lord Gordon'[16] when it is Lord George Gordon MP who was meant — not merely a quibble given that he held the title 'Lord' only by the courtesy extended to younger sons of the higher nobility and that fact requires by custom his first name to be mentioned, as it indeed always is in discussions by more established historians. However, leaving aside such quibbles, this chapter makes a very useful contribution in what is already a well-ploughed field because it considers insightfully and in detail the trial of a newspaper editor, one Harry Seekamp, for seditious libel, which has been neglected in the past in favour of the principal trials of thirteen diggers for high treason. Another outstanding example of a substantial contribution to a field that is also the subject of many existing works and which might have been wrongly thought insusceptible of enrichment by student work is the essay on a suffragette trial of 1908 by my former research assistant.[17] It offers a well-argued reinterpretation of an event that had been previously the subject of a small literature in a manner that does great credit to the student and is a very good example of legal history firmly situated within its broader societal context.

One essay at least raises issues which would be beyond the wit of the greatest historian to solve. In the discussion of the trial of Anne Boleyn,[18] the rather startling conclusions are reached that the trial was unfair because of her likely innocence, but not unjust solely because the outcome was determined in advance, the latter being the contemporary standard.[19] This raises a number of very difficult issues at

12 Stevens (n 3); Harrison-Ichlov (n 5); Pickering (n 7); O'Connor (n 8); Townsend (n 9).

13 Jeremy Finn, 'A Formidable Subject: Some Thoughts on the Writing of Australasian Legal History' (2003) 7(1) *Australian Journal of Legal History* 53, 62.

14 Nicolo (n 6) 119.

15 See, eg, *Criminal Informations Act 1929* (SA).

16 Nicolo (n 6) 123.

17 Harrison-Ichlov (n 5).

18 Stevens (n 3).

19 Ibid 49.

the intersection of law and politics. I refer here not merely to the obvious questions of the overall relationship between the law — with its claim to effecting justice on a principled basis divorced from everyday concerns and considerations of personal advantage — and the political actors who make the law and appoint its officials; while Anne Boleyn's trial raised such problems in a 16th century context — which it is difficult, although not impossible for us to enter into the mindset of — current events such as confirmation hearings for the Supreme Court of the United States of America may bring to light issues that, at their root, are vaguely similar. More broadly, however, issues around what is sometimes called 'presentism' are raised by the discussion in the chapter in question:[20] to what extent is it legitimate to judge past events on the basis of present-day moral standards? We must, in my view, avoid both the Scylla of indiscriminating condemnation of past ages, remembering that their resources and technology were far more limited than those available to us today and that they did not have as much of the experience of the horrors (as well as the achievements) of which our civilisation is capable as revealed in the 20th century's world wars, and also the Charybdis of allowing everything to pass as unobjectionable because it was done in the past and therefore must be considered in accordance with the standards of the past. We cannot simply pass over Stalin's purges or the famines his regime caused, let alone the even greater horrors of Nazism, without some form of moral judgment simply because the principal actors may have believed that their actions were for the greater good and thus justified and in accordance with right standards.

The essay on Anne Boleyn veers, I fear, too far towards the whirlpool of Charybdis, which is not to say that anyone now alive could do much better — indeed, eternal fame awaits the historian who can come up with a coherent and generally accepted theory on the topic of applying present-day standards to past injustices. It would indeed be too much to ask of a neophyte to deal in any detail with a topic of such complexity and vast scope, and I am certainly not going to try here either because I shall fail dismally. However, it is startling to read that 'it can be argued that Anne's trial is unjust because she was innocent, but not unjust because that decision [of guilt] was made prior to trial'.[21] The reviewer of the student's work might have suggested second thoughts here, not merely because a trial might have been necessary to establish Anne's innocence or guilt, and the mere holding of a genuine trial of an innocent person is unlikely to be unjust in itself, but also because we need to ask, if we raise the question at all by using concepts such as 'unjust', whether any conception of justice can admit of show trials because they were supposedly the standard of the day. This topic is one that an academic would have been justified in raising with a student during the conception of the original piece that was written as part of the JD course and certainly by the point of publication; it might also have been useful to refer to works of historiography such as EH Carr's classic *What Is History?*.[22]

20 Ibid.

21 Ibid 52.

22 EH Carr, *What Is History?* (Penguin Books, 2008) ch 3.

It is easy to imagine the deep sense of satisfaction felt by each student at what for many, if not all, will be a first foray into print. That feeling, despite the occasional reviewer's quibble, is justified, as is the — perhaps less obvious — pride that Melbourne Law School can feel on possessing staff and publishers who were able to bring this project to a successful conclusion.