LAUNCH OF LAW MEMORY & LITERATURE 2004

JUSTICE ATKINSON: *Law, Memory and Literature* is the first of what is expected to be a series of annual publications of the Australian Legal Philosophy Students Association, presently based in Queensland. ALPSA's President, Max Leskiewicz, as the driving force and commissioning editor behind this collection, had the brilliant idea of asking many of the brightest, and therefore busiest, people in the field to write letters rather than submit formal articles. Many of the essays are written as personal epistles to 'Dear Max', and range from the rather patronising 'My young friend' by one contributor, to some serious and extended pieces by other international authorities from Australia, America, Britain and elsewhere, who clearly consider both the issues and the volume in which they appear as worthy of the best levels of serious scholarship. Around and woven through these essays are poems, stories and photographs by members of the editorial board and other creative souls. There are too many to mention individually, but they give the collection an impressive range of voices – some linking directly to the main theme, others diverging widely, but nearly all concerned with the relationship between the internal and the external, and many with the tensions between public and private life which the first two words of the title, 'law', and 'memory', might suggest.

ASSOCIATE PROFESSOR FOTHERINGHAM: The third term in the title, 'literature' sits slightly less comfortably in the mix, although it has been given pole position, since most of the essays in the first half of the volume relate to literature. Interestingly, it is here that most of the contributors from the United States of America are grouped,

because it is in the USA that ‘Law and Literature’ has become something of a growth industry. In the US students mostly do not go from high school directly into law, medicine, or other professional degrees, but into liberal arts colleges, where they encounter a range of general science and humanities courses for two or three years before entering professional training. In the colleges considerable emphasis is placed on reading great literature, and now, increasingly during their professional law studies as well, courses are offered in literature that deals in subject matter with lawyers and legal issues. From the essays in *Law, Memory and Literature*, it would seem that Shakespeare, Charles Dickens – particularly *Bleak House* – and Herman Melville’s short story ‘Bartleby the Scrivener’, have become grouped as a mini-canon of stories used widely in law schools across the US to engage students with some of the larger questions of jurisprudence and social justice in an imperfect world of human beings.

What was surprising to me about the essays in this section is how *uncontroversial* they are, for, had we but world enough and time, who would not agree that our future legal leaders should engage not just with great case writers but also with great creative writers, and be reminded, as Isabella reminds the supposedly ‘just but severe’ Duke Angelo in Shakespeare’s *Measure for Measure*, that:

> … man, proud man,
> Dress’d in a little brief authority,
> Most ignorant of what he’s most assured
> (His glassy essence), like an angry ape
> Plays such fantastic tricks before high heaven
> As makes the angels weep. (II, ii, 117-122)

The McGill Shakespeare Moot Project, which Professor Desmond Manderson has written about in his fascinating letter, is perhaps the most pedagogically thoughtful and sophisticated elaboration of this idea.

But, as we know, this admirable humanising aim has not been the only consequence of bringing together law and literature, and has not been without heat. One of the few commentators in the volume to address rather more controversial interdisciplinary matters is William Twining, whose piece on 'Stories and Argument' is the centre point of the volume, in my view one of its strongest chapters, and links the literature section to the second half where history and the relationship between memory and historical reconstruction become the central topics for debate. Twining points out that law reports are on one level "a vast anthology of short stories" and sometimes select "facts" according to the rules of storytelling and genre rather than those which a more dispassionate evaluation of the relevant and the irrelevant might suggest. He takes aim at Lord Denning, allegedly the law's greatest storyteller, and in particular at his much admired and much criticised judgment in *Miller v Jackson*, where he ignored many of the facts in the case in order not to break the idyllic mood he evokes of an innocent home county village cricket team threatened by nasty and unsporting newcomers. As Twining suggests as the "central theme" of his essay, stories "are necessary but dangerous … they may be accepted because they are familiar and reassuring or memorable rather than because they are true". We have had an example of this in Brisbane recently in the contretemps surrounding *The Mayne Inheritance*, family biography, play, and historical articles, where the facts of history were swamped by a stock "Faustian bargain" narrative,

whereby Patrick Mayne is supposed to have got the money to start his business by robbery and murder. It makes a satisfying story for those who believe that no-one succeeds in life without embracing evil, but as Bernadette Turner has comprehensively demonstrated, the evidence that Mayne did so is clearly insufficient. Accepting many of the critiques provided by post-modernism does not mean believing that verifiable facts don't matter; in a wonderful conclusion, Twining ends his contribution by inviting us to read "the imaginative post-modernism of Italo Calvino, who glories in the world's complexities without giving up on a distinction between what is out there (ontology) and our capacity to grasp it (epistemology)."

JUSTICE ATKINSON: *Law, Memory and Literature* is one of a number of recent interventions in the debate about the different ways in which different humanities and humanitarian disciplines – law, history, literary studies and theory – approach "proof and truth". I have taken this phrase not from the volume we are discussing but from another recent publication, Iain McCalman's and Ann McGrath's edition for the Australian Academy of the Humanities called *Proof and Truth: the Humanist as Expert*. This passionate defence of the post-modern historian was reviewed in last month's *Australian Book Review* by Justice Michael Kirby. His Honour writes, "The historians are puzzled and hurt by the law's method of receiving their testimony", and fairly sets out their concerns, while trying to explain the ways in which courts too are under active review throughout Australia, attempting to find new and better ways to, as he concludes, deliver "just and lawful outcomes to the disputes that are brought to law".

At the other extreme have been the swingeing attacks on so-called "French Postmodernism", notably by scientists such as Sokal and Bricmont in their 1998 book *Intellectual Impostures*, the cover of the English translation of which proclaims "The merde hits the fan". From their perspective postmodernists simply misunderstand the terms and concepts of other disciplines and use them rather as a drunk uses a lamppost – for support rather than illumination. This is a robust debate which I am happy to observe from a side box, but I did note in several contributors to the present volume the semantic slippage which occurs to a word like "testimony' which seems increasingly to be used by non-lawyers simply to refer to uncorroborated and unchallenged personal statements, yet which they then go on to value as if they had the same quality of reliability as the receipt of legal testimony given under oath or affirmation and subject to rigorous cross-examination. This, I'd suggest, is where much of the misunderstanding and heat has occurred between legal process and conclusions, and those who approach memory and storytelling from other points of view.

Law, Memory and Literature does offer a range of commentators who each consider the relativist challenge to "truth" in relation to some of the controversial legal cases and historical issues of contemporary memory: the Lindy Chamberlain saga, various Indigenous land rights claims, the "Stolen Generations" narratives, the abuse of children in government institutions, the recent question of the access of asylum-seekers to the courts, to mention only some of the most obvious amongst many which challenge or confront social understanding of both immediate and longer-term justice. Justice Ian Callinan, in the Preface to this volume, who

himself has a second role as a creative writer, takes up this challenge, coming down firmly on the side of pragmatic wisdom. “Judges cannot afford the luxury of much contemporary literature,” he writes, “of blending fiction and fact. … The fact that the ascertainment of truth is difficult, in some cases impossible, is no reason to abandon the search for it.” He is equally dismissive of moral relativism, arguing that while “moral values …. may differ from culture to culture, and even within a culture”, this is “insufficient reason to discard them”.

A number of the contributors to this volume, while not necessarily promoting relativism beyond final judgment, set out to ask new questions about the relationship between history, memory, and legal process. Along with Twining’s essay, Austin Sarat’s major jurisprudential essay; “History and Memory in Legal Decisions and Legal Practice”, and Martin Stuart-Fox’s response to Sarat, titled “Law and History”, were for me the most stimulating section of the book. Both authors put law and history together on the side of objectivity and the search for truth, but draw attention to the problematic status of memory as evidence. Sarat goes to the heart of the problem:

> “To turn from history to memory is to move from the disciplined effort to marshal evidence about the “truth” of the past to the slippery terrain on which individuals and groups invent traditions and record partisan versions of the past on the basis of which they seek to construct particular conditions in the present.”

Law, as he notes, tries to use past memories as part of its search for the facts of a case, measures those facts against a frame of other cases, hoping to arrive at a conclusion that will be useful in the future. Martin Stuart-Fox glosses this by pointing out that the historian tries to do the same but within a different framework: the historian is not constrained by "permissible evidence" or, as a lawyer might say, admissible evidence, but can range more widely in deciding what is relevant to the topic under examination, and is also free to ignore precedent. He observes:

> "Because historical events have been interpreted in a certain way in the past does not mean that later historians are bound to interpret those events in a similar way."

But it is interesting that both modern historians and lawyers have had to deal with the grave injustice caused by historical accounts and by legal doctrine that failed to give due account to the original inhabitants of Australia, their pre-existing relationship with the land and the story of their conquest. And both have had to face the inevitable backlash.

Both Sarat and Stuart-Fox draw extensively on the philosopher Pierre Nora, whose writings on memory I don't know but which is now on my "to read" list. I'd urge you, if you only have time to dip into this excellent collection, to focus on Twining's, Sarat's, and Stuart Fox's important essays; read some of the fine poetry and stories, and look closely at the photographs which do so much both as visual commentary and as design elements.

ASSOCIATE PROFESSOR FOTHERINGHAM: We both congratulate Max and his fellow contributors and editors, particularly Katherine Del Mar, who was responsible for designing the volume, on this important and beautifully produced book, and hope that it will be only the first of many such annual volumes, provoking, challenging, and pushing at the frontiers. Go and buy a copy now.