

## HOW *MABO* HELPS US FORGET

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### I INTRODUCTION

*Mabo*<sup>1</sup> has been acclaimed as a triumph of remembering.<sup>2</sup> The case acknowledged a shift in Australian history in the 1970s and 1980s towards a greater recognition of the violence of British colonisation and the extent of Aboriginal dispossession from land. It recognised for the first time a legal basis for Indigenous claims to land based on traditional associations with ‘country’<sup>3</sup>, and it established a central role for history in the determination of native title rights. The case has led to a new level of engagement between academics from the disciplines of Law and History, and new interdisciplinary work on the relationship between law and history.<sup>4</sup>

Before *Mabo*, the most direct overlap between Law and History in Australia was through the work of legal history scholars, predominantly legal academics who use legal documents from the past to understand society and its law, and to provide a particular historical context for analysing current developments in the law. Although legal history is drawn upon occasionally by the courts to add to their

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<sup>1</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo’*).

<sup>2</sup> See, for example, Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (1996); Nonie Sharp, ‘No Ordinary Case – Reflections on *Mabo (No 2)*’ (1993) 15 *Sydney Law Review* 143; Jeremy Webber, ‘The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*’ (1995) 17 *Sydney Law Review* 5.

<sup>3</sup> ‘Country’ is often used in contrast to ‘land’ to describe Indigenous relationships to land and water. See eg, Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (1996) 7 for a description of what country means for Aboriginal Australians.

<sup>4</sup> In this paper, the capitalised versions of ‘Law’ and ‘History’ are used to refer to the academic disciplines of law and history. The non-capitalised version of ‘history’ refers to the body of theory and practice of interpreting the past which is encompassed in the discipline of history. Similarly, the non-capitalised version of ‘law’ refers to the body of theory and practice surrounding the use of legal rules to regulate behaviour and resolve disputes.

justifications for decisions, the work of legal historians has otherwise remained at the margins of legal practice. Even the most celebrated legal historian, F W Maitland, did not consider legal history to be essential to an understanding of legal doctrine. '[I]t is true and happily true that a man may be an excellent lawyer and know little of the remoter parts of history.'<sup>5</sup>

Outside of legal history, the judicial approach to writing history was rarely the subject of academic consideration prior to *Mabo*.<sup>6</sup> Since *Mabo*, a wealth of literature has developed analysing the role of history in native title law, and critiquing the Australian courts' use of history in major High Court and Federal Court decisions, particularly *Yorta Yorta Aboriginal Community v Victoria*<sup>7</sup> and *Wik Peoples v Queensland*.<sup>8</sup> The critiques have focused on the justification for drawing on general and legal history for the development of the principles of law,<sup>9</sup> on the adequacy of judicial historiography in native title decisions,<sup>10</sup> and on the use of historians and historical evidence in native title litigation.<sup>11</sup> This paper contributes to this literature by comparing how law and history make use of the past, and by sounding a warning about what happens to interpretations of the past when placed in legal hands. The paper argues that there is a necessary process of forgetting in the resolution of legal issues, and that this distinguishes between the use of the past in law and in history. It concludes with the proposition that contrary to the popular portrayal of *Mabo* as a triumph of remembering, the judgment is in important respects a mechanism for forgetting. The recognition that there are dangers in the use of history to facilitate legal resolution is not, however, a call to abandon law's engagement with history. On the contrary, the paper argues that this engagement

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<sup>5</sup> F W Maitland, 'Why the History of English Law is not Written' in H A L Fischer (ed), *Collected Papers of Frederic William Maitland* (1987) vol 1, 493. However, other legal historians have argued that a proper understanding of the principles of law requires an understanding of their origin and development. See generally, D J Boorston, 'Tradition and Method in Legal History' (1941) 54 *Harvard Law Review* 424, 424-8; Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457; Victor Windeyer, 'History in Law and Law in History' (1973) 11 *Alberta Law Review* 123.

<sup>6</sup> One exception is Rob McQueen, 'Why High Court Judges Make Poor Historians' (1990) 19 *Federal Law Review* 245.

<sup>7</sup> (2002) 214 CLR 422 ('*Yorta Yorta*').

<sup>8</sup> (1996) 187 CLR 1 ('*Wik*').

<sup>9</sup> See eg, Mandy Paul and Geoff Gray (eds), *Through a Smoky Mirror: History and Native Title* (2002); Attwood, above n 2.

<sup>10</sup> See, eg, Alex Reilly and Ann Genovese 'Claiming the Past: Historical Understandings in Australian Native Title Jurisprudence' (2004) 3 *Indigenous Law Journal* 19; David Ritter and Frances N A Flanagan, 'Stunted Growth: The Historiography of Native Title Litigation in the Decade since *Mabo*' (2003) 10 *Public History Review* 21, Alex Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453; Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20 *University of Tasmania Law Review* 129.

<sup>11</sup> Sandy Toussaint (ed), *Crossing Boundaries* (2004); Christine Choo and Shawn Hollbach (eds), *History and Native Title* (2003); Ann McGrath and Iain McCalman (eds), *Proof and Truth: The Humanist as Expert* (2003); Ann Curthoys, 'The Proof of Continuity of Native Title: An Historian's Perspective' *Land, Rights, Laws: Issues of Native Title: Issues Paper No 18* (1997).

with history is to be welcomed as it broadens the judges' framework for justification in their decisions.

In native title judgments, historians have been used primarily to aid in the construction of a coherent chronology of events. This relieves lawyers and judges of the need to conduct their own historical investigations, and thus is a more efficient use of court time and resources. However, while historians have been called as experts in native title cases for many years now, there continue to be cases in which judges rely on their own historiographical skills to establish the social history of claim areas, or to interpret the relevant archival and secondary material, even after the criticisms directed at Olney J's approach in *Yorta Yorta*.<sup>12</sup> It is important to continue to impress upon the Law the complexity of our relationship to the past, and the weight of scholarship in History on historical method that might be used to enhance the rules of evidence and to prevent judges relying on their own conceptions of the past in the resolution of native title claims. I have made the case for a broader role for History in the resolution of native title claims elsewhere.<sup>13</sup> This paper adds to the case by identifying a structured process of forgetting in legal decision-making, using *Mabo* as a case study.

The paper is developed over three parts. Part II contrasts how and why History and Law access the past, and demonstrates that the different motivations of history and law shape how events are remembered and forgotten within each discipline. The primary proposition of the paper is introduced here; that one of the law's primary motivations for accessing the past (and for using history and historians in this process) is to lay the past to rest, resolve its disputes and move on. Part II also makes reference to debates that have surrounded the role of history in the resolution of war crimes trials in other jurisdictions and in the defamation action that David Irving brought against Deborah Lipstadt for allegations made against him in her book, *Denying the Holocaust: The Growing Assault on Truth and Memory*. Part III explains how *Mabo* introduced a new role for history in the law and highlights some of the issues to which this engagement with history has given rise. Part IV discusses the dangers of using history in the resolution of legal disputes, with particular reference to the role history has played in *Mabo* and the native title claims process. It concludes with the claim that in important respects *Mabo* silences those for whom it casts judgment and aids an institutional process of forgetting.

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<sup>12</sup> For a recent example, see *Jango v Northern Territory of Australia* [2006] FCA 318 (Unreported Sackville J, 31 March 2006).

<sup>13</sup> Reilly and Genovese, above n 10.

## II THE PLACE OF THE PAST IN LAW AND HISTORY

For History, events in the past are primarily a resource for understanding.<sup>14</sup> Understanding requires constant revision of established explanations of the past, testing these explanations in new contexts, and being always open to alternative explanations. Any version of the past is open to reinterpretation in the way events are portrayed and of what they stand for. The search for understanding aids remembering. Through revisiting and reinterpreting the events of the past, they stay close at hand and become integral to experience. Historians document, explain and represent the past from various perspectives for a variety of purposes. The methodological debates among historians accept the core practice of history, but question what is possible and useful within that practice.<sup>15</sup>

In the late 18<sup>th</sup> century, academics at the University of Göttingen, established an approach to history which focused on preserving the past by systematically accumulating documentary sources for the events of the past. This approach to historical work influenced two of the most influential historians in the 19<sup>th</sup> century, Lord Acton and Leopold Von Ranke.<sup>16</sup> They developed a positivist school of historiography which developed standard and consistent methods for investigating the past.<sup>17</sup> History was understood as the accumulation of facts drawn from official archives. Historians simply needed to gather together and order their archival sources, and let the facts ‘speak for themselves’.<sup>18</sup> It was believed that the authoritative sources had a coherence of their own. It was not the role of historians to reveal this coherence through their interpretation of the sources. The positivist school has its origins in the work of Herodotus (c 484-425 BC) who described the role of the historian to be to chronicle the past, to preserve ‘that which owes its existence to men ... lest it be obliterated by time’.<sup>19</sup> Hannah Arendt has linked this desire for preservation to an anxiety over mortality. Through remembering, human beings could give permanence to works, deeds and words, and thus resist their perishability.<sup>20</sup>

The law gathers and uses documentary sources with a similar rigour to that of the positivist school of history. However, the law differs significantly from the

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<sup>14</sup> This is the case for positivists through to postmodernists. See eg, E H Carr, *What is History?* (1961); David Thomson, *The Aims of History* (1969); David Lowenthal, *The Past is a Foreign Country* (1985); Keith Jenkins, *Re-Thinking History* (1991); Beverley Southgate, *History: What and Why* (2<sup>nd</sup> ed, 2001).

<sup>15</sup> Postmodernism has provided these debates with renewed energy. See generally, Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (1987); Jenkins, above n 14. In response to post-modernist critique, see, eg, Richard Evans, *In Defence of History* (2000).

<sup>16</sup> Thomson, above n 14, 38.

<sup>17</sup> See eg, Leopold Von Ranke, *History of England Principally in the Seventeenth Century* (1966); John Emerich Edward Dalberg Acton, *Lectures on Modern History* (1956).

<sup>18</sup> Agnes Heller, *A Philosophy of History in Fragments* (1993) 125-6.

<sup>19</sup> Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (1968) 41, quoting Herodotus.

<sup>20</sup> Ibid 42.

positivist school in the way it uses its sources to present a version of the past. Facts do not speak for themselves in the law. Instead, they are evaluated, judged and turned into the most plausible narrative of events for the resolution of disputes. This role of interpretation in law means that the law is more closely associated with the ‘Whig’ interpretation of history.<sup>21</sup> Whig historians assessed past political events in contemporary terms, just as lawyers use events in the past to reinforce contemporary principles of law.<sup>22</sup> Herbert Butterfield was concerned that Whig historians were distorting the past by treating the ‘present as the inevitable outcome of a triumphant historical process’.<sup>23</sup> Butterfield’s perspective was that of the positivist. He was concerned that Whig historians were interpreting the past, rather than letting it speak for itself.

By the beginning of the 20<sup>th</sup> century, philosophers of history were voicing strong criticism of historical positivism.<sup>24</sup> They exposed as fantasy the existence of unmediated facts from the past. The events of the past are not the same as the records of those events, and history, the analysis of the records of those events, is necessarily distinct from the past. ‘[T]he past and history are not stitched into each other such that only one historical reading of the past is absolutely necessary.’<sup>25</sup> Nor were early 20<sup>th</sup> century historians enamoured of Whig historiography. The records of events themselves were understood to be influenced by the attitudes, perspectives and prejudices of the chroniclers of those events, and these records were then subject to the interpretations of historians with their own perspectives and prejudices. Furthermore, it was understood that the chroniclers and historians themselves made choices about which events to record and analyse, and which to exclude. It is these choices, and not some natural process of selection, that determines what become the facts of history.<sup>26</sup> To understand an historical fact, then, it is necessary to reflect on the attitudes, beliefs and perspectives of both the initial chronicler of the facts and the historians who drew on them.

For most contemporary historians, the positivists’ search for the most ‘accurate’ version of the past is not a sufficient historical methodology. E H Carr described history as an unending dialogue between the historian and his or her facts.<sup>27</sup> One of the key feminist, postcolonial and postmodernist emphases is on the prejudices the author brings to their work, the limitations of language, and the particularity of methodology, in the search for meaning. If one chooses reliability over the breadth of coverage of sources, one will write a different historiography, but not one that is necessarily truer to the past. It is vital then, not only that historians foreground their own methodology and preconceptions as a limitation to their historiography, but

<sup>21</sup> See generally, Herbert Butterfield, *The Whig Interpretation of History* (1963).

<sup>22</sup> Southgate, above n 14, 119.

<sup>23</sup> Southgate, above n 14, 119, quoting Butterfield.

<sup>24</sup> See eg, Wilhelm Dilthey, *Pattern and Meaning in History: Thoughts on History and Society* (1962); Benedetto Croce, *History: Its Theory and Practice* (Douglas Ainslie trans, 1960); R G Collingwood, *The Idea of History* (1946).

<sup>25</sup> Jenkins, above n 14, 7.

<sup>26</sup> Carr, above n 14, 8.

<sup>27</sup> Carr, above n 14, 24.

also that they scrutinise their sources for the methods and prejudices that they contain. However not all historians have abandoned positivism as their guiding principle, and there are still historians who assert an objective truth in their interpretations of the past.

In Australia, recent debates about Australia's colonial past have largely been a clash of methodologies. Keith Windschuttle has taken the position of the positivist arguing that the sources must be left to speak for themselves.<sup>28</sup> From this position, he criticised historians of the colonial period such as Henry Reynolds and Lyndall Ryan for inadequately supporting their interpretations of past events with direct references to the archive.<sup>29</sup> Windschuttle scrupulously matched the propositions made in the work of such historians against the archival references they relied on. Since for Windschuttle the archive is the definitive version of the past, any proposition not supported by the archive is inaccurate and therefore not history. In their defence, Reynolds and Ryan point to the fact that the archive is the creation of the coloniser and cannot be expected to contain the whole story. Historians must, they argue, read between the lines, hear the silences, use other sources, and keep in mind that most of the blood spilt in the name of colonisation was not spilt in the archive.<sup>30</sup>

Despite these continuing controversies, in the remainder of this paper, where it is suggested that there are differences between law and history, it is between scholars of history that reject a rigid positivism and legal practitioners and judges whose approach to fact-finding is grounded in a positivist methodology. This generalisation of 'law' also needs qualification. There are branches of legal scholarship, such as legal realism in the 1930s,<sup>31</sup> and critical legal studies in the 1970s and 1980s,<sup>32</sup> which have powerfully critiqued law's positive methodology. In many respects, the approach in this paper has its genesis in these critiques.

By its very nature the past is an absent phenomenon, and outside the frame of reference of the present.<sup>33</sup> We can only access the past through the vehicle of

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<sup>28</sup> Keith Windschuttle, *The Killing of History: How a Discipline Is Being Murdered by Literary Critics and Social Theorists* (1994).

<sup>29</sup> Keith Windschuttle, *The Fabrication of History of Aboriginal History* (2002). For a critique of Windschuttle, see Robert Manne (ed), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* (2003).

<sup>30</sup> Henry Reynolds, 'Terra Nullius Reborn' in Manne, above n 29, 109, and Lyndall Ryan, 'Who is the Fabricator?' in Manne above n 29, 230. For further debates on methods and approaches to history in the Australian colonial context, see Stuart MacIntyre (ed), *The Historian's Conscience: Australian Historians on the Ethics of History* (2004); Stuart MacIntyre and Anna Clark, *The History Wars* (2003).

<sup>31</sup> See eg, Jerome Frank, *Law and the Modern Mind* (1930).

<sup>32</sup> See eg, Robert Gordon, 'Historicism in Legal Scholarship' (1981) 90 *Yale Law Journal* 1017; Roberto Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976); Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515.

<sup>33</sup> See eg, Lowenthal, above n 14, xvii: 'The past is a foreign country whose features are shaped by today's predilections, its strangeness domesticated by our own preservation of its vestiges.'

memory.<sup>34</sup> Memory is dependent on images and in this sense is always ‘imagined’. How closely related an image is to the thing it indicates is the primary question in determining the adequacy of any representation. Is a memory the recall of something that already exists or is it the creation of something new? Is it retention or reproduction?<sup>35</sup> For Lowenthal, the answer is clear. The ever-growing distance between a memory and the event or object imagined means that memories are necessarily dynamic and changing.

Far from simply holding on to previous experiences, memory helps us to understand them. Memories are not ready-made reflections of the past, but eclectic, selective reconstructions based on subsequent actions and perceptions and on ever-changing codes by which we delineate, symbolize and classify the world around us.<sup>36</sup>

In recollecting the past, there are two ever present anxieties: First, that we will forget: ‘Searching for a memory ... attests to one of the major finalities of the act of remembering, namely, struggling against forgetting, wresting a few scraps of memory from the “rapacity” of time.’<sup>37</sup> Second, that if we remember, our remembrance is fundamentally flawed: ‘no theoretically sufficient verification of any past fact can ever be hoped for’.<sup>38</sup>

History is both a strategy to overcome the fear of forgetting, and a recognition of the inevitability of forgetting. Ricœur puts the question thus: Is history ‘remedy or poison’.<sup>39</sup> Paradoxically, history can be perceived as a threat to memory.<sup>40</sup>

[History] will introduce forgetfulness into the soul of those who learn it: they will not practice using their memory because they will put their trust in writing, which is external and depends on signs that belong to others, instead of trying to remember from the inside, completely on their own.<sup>41</sup>

The many phases in the writing of history - the documentary phase of creating the archive, the phase of explaining and understanding, and the phase of representation or writing – all involve complex processes of interpretation that create a distance between the image and what is remembered in history.<sup>42</sup>

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<sup>34</sup> Paul Ricœur, *Memory, History, Forgetting* (Kathleen Blamey and David Pellaver trans, 2004) 21 [trans of: *La mémoire, l'histoire, l'oubli*].

<sup>35</sup> Ibid, 33.

<sup>36</sup> Lowenthal, above n 14, 210.

<sup>37</sup> Ricœur, above n 34, 30.

<sup>38</sup> C S Lewis, *Analysis of Knowledge and Valuation* (1947) 200, cited in Lowenthal, above n 14, 187.

<sup>39</sup> Here Ricœur is extending a metaphor in Plato’s *Phaedrus*, in which Plato retells a great myth: ‘O king, here is something that, once learned, will make the Egyptians wiser and will improve their memory; I have discovered a potion for memory and wisdom’: at 274 (e), cited in Ricœur, above n 34, 141.

<sup>40</sup> Ricœur, above n 34, 141.

<sup>41</sup> Plato, *Phaedrus*, 275(a) cited in Ricœur, above n 34, 142.

<sup>42</sup> Ricœur discusses history in these phases in Part II of *Memory, History, Forgetting* (2004).

It is not hard to make a case for the role of the past in law. Oliver Wendell Holmes stated it elegantly. ‘The life of the law has not been logic: it has been experience.’<sup>43</sup> Richard Posner has described law as ‘the most historically orientated, or if you like the most backward-looking, the most “past-dependent” of the professions’.<sup>44</sup> Most of the core principles of the law acknowledge the authority of the past in decision making – the doctrine of precedent and the concept of *ratio decidendi*, the role of founding intention in statutory interpretation, and the rules of evidence.

The law requires a version of the past that has authority and assists the process of resolving disputes. Disputes must be resolved no matter how evenly balanced the arguments are for favouring one version of the past over another. A version of the past must be chosen and propounded, the rules of law applied to it, and a decision made. Legal resolution, then, involves *enduring* the effects of the past. Courts encounter competing versions of the past, order them, interpret them and judge them.

Since legal claims usually involve events that have occurred during the lifetime of living plaintiffs and defendants, the past is mainly approached through the testimony of witnesses who participated in the events which the courts are called upon to interpret. The hearsay rule explicitly privileges eye-witness testimony over second hand information in documentary or other forms.<sup>45</sup> It is important to note, however, that what the law privileges is what it considers to be most reliable and not memory over history per se. This is evident in the law’s privileging of archival sources over oral history in cases such as *Yorta Yorta*. In *Yorta Yorta*, it was the unchangeable nature of the archive that was considered to enhance its reliability over the oral histories of the claimants.<sup>46</sup>

Law’s use of the past is reflexive. Judges search within the law’s resources, primarily statute and case law, to order its facts and establish its principles. Law’s use of memory is also selective. The rules of evidence filter relevant from irrelevant memories. Relevant memories are elicited, interrogated, judged plausible or implausible, and ultimately used to provide a definitive version of the past that aids the resolution of claims. Once the most plausible story is constructed, other memories have no place in the justification for a decision. For the law, then, memory is not only accessed selectively, but there is also an institutional process of forgetting. A memory is raised to the level of fact once competing possibilities are removed from consideration, and this removal or forgetting is *constitutive* of memory.<sup>47</sup> Lowenthal describes this process well. ‘Memories must continually be

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<sup>43</sup> Oliver Wendell Holmes Jr, *The Common Law* (1881) 1.

<sup>44</sup> Richard Posner, ‘Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship’ (2000) 67 *University of Chicago Law Review* 573, 573.

<sup>45</sup> See eg, *Evidence Act* 1995 (Cth) s 59.

<sup>46</sup> *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606, [21], [22], [106] (Olney J).

<sup>47</sup> Henry Rousso, *The Haunting Past* (Ralph Schoolcraft trans, 2002) 4 [trans of: *Hantise du passe*].

discarded and conflated; only forgetting enables us to classify and bring chaos to order.<sup>48</sup>

In contrast to law, historians choose from where their inquiries start and to where they return. Legitimacy is not in faithfulness to an imagined past, but in the method of inquiry. In the 20<sup>th</sup> century, debates over the nature of history have focused on the question of method.<sup>49</sup> For History, legitimacy comes from acknowledging the gaps in knowledge, making conservative and fully justifiable claims based on the archives and other sources, and being sensitive to context. Historians build up representations through appraisal and reappraisal of old and new sources. The archive is used to find connections wherever they may lie. The historian ‘extend[s] the investigation to a wider number of actors, to the second-level executors, to bystanders, those more or less passive witnesses that are the silent populations in their complicity’.<sup>50</sup> History does not need to rely on the unequivocal assertions of memory. Time may soften a memory and allow more nuanced versions of events to emerge. History is interested in voices with competing memories and in the traces that may be lost to memory altogether.<sup>51</sup> There is no deadline for final conclusions in history. ‘History knows that it can wait for more evidence and review its older verdicts; it offers an endless series of courts of appeal, and is ever ready to re-open closed cases.’<sup>52</sup> Nor are the avenues of inquiry so restricted.

The historian who tries to reject everything that is unproven will be rejecting much that is true. His talent lies neither in a corrosive and tiresome scepticism about everything, nor in an absolute positivism, but in discernment and discrimination, best called ‘historical understanding’.<sup>53</sup>

So where the law seeks only positive proof from its sources, historians are equally interested in what cannot be proved. Historians are interested in the silence in documents, and are free to speculate about those silences. For example, in *Cubillo v Commonwealth (No 2)*,<sup>54</sup> in which the extent of the Commonwealth government’s liability for the removal of Aboriginal children from their families was being tested, the Court had to determine the significance of a mother’s thumbprint on a consent

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<sup>48</sup> Lowenthal, above n 14, 205.

<sup>49</sup> There are enduring works on the theory of history which still resonate today. In *What is History?* (1961) E H Carr presents a sustained critique of the positivist search for historical truth. ‘The belief in a hard core of historical facts existing objectively and independently of the interpretation of the historian is a preposterous fallacy, but one which its is very hard to eradicate’: 6. See also. Collingwood, above n 24, in which he critiques ‘scissor and paste’ history: 257-66.

<sup>50</sup> Ricœur, above n 34, 324.

<sup>51</sup> Rousso, above n 47, 7. For a critique of Rousso’s analysis, see Richard Evans, ‘History, Memory and the Law: The Historian as Expert Witness’ (2002) 41 *History and Theory* 326. Evans endorses Rousso’s concerns about what the law makes of history, but points out that Rousso has an essentially conventional understanding of history which allows him to make such a clear distinction between history and memory.

<sup>52</sup> J R Hale, *The Evolution of British Historiography* (1967) 58.

<sup>53</sup> Thomson, above n 14, 102.

<sup>54</sup> *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1 (*‘Cubillo’*).

form. For the law, the thumbprint was either evidence of the mother's consent to the removal of her child, or it was evidence of nothing. For historians, restricting the interpretations that can be attributed to the thumbprint in this way excludes a whole range of other possible inferences and conclusions.<sup>55</sup>

The differences between law and history have led some historians to argue that history ought not to be involved in the process of legal resolution. Commenting on a number of trials of French officials who collaborated with the Germans during the occupation of France from 1940 to 1944, the historian Henry Rousso argued 'the declared goal is to illuminate an entire era and its politics' and to achieve 'catharsis on a national scale'.<sup>56</sup> Rousso opposed the use of historians in these trials. His objections centred on the way the legal process constructed the past as a thing to be revived and commemorated, particularly through the use of the testimony of witnesses. For Rousso, such firsthand accounts lacked the perspective of history. Although history might have provided the perspective lacking in these accounts, Rousso was concerned that the legal process in itself acted as a form of memorialisation. The testimony of witnesses is a fact in the present, regardless of whether it is faithful to the past. Through the testimony of witnesses, the courts search for an authentic past, and through creating it, settle it for future generations. '[P]eople today expect to see the guilty parties clearly designated for each of the century's tragedies that we have not been able to assimilate.'<sup>57</sup>

In her observations of the trial of Adolf Eichmann in Jerusalem in 1961, Hannah Arendt noted that the trial was more about judging the Nazi regime and anti-semitism throughout history than prosecuting Eichmann as an individual who participated in criminal acts during the war.<sup>58</sup> Implicit in her analysis is that the law is not a good forum to interrogate the broader questions of history. Michael Marrus and Mark Osiel have also argued that law's focus on outcomes means it is not the forum for writing history.<sup>59</sup> 'The shape of the stories told in trials ... follows the definition of the crimes with which the accused are charged, rather than an impartial assessment ... of the events themselves.'<sup>60</sup> The law seeks a thin version of the past to keep its investigations manageable. History threatens to provide alternative versions and a broader context which detract from the normative force of the law.

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<sup>55</sup> For discussion of *Cubillo*, see Jennifer Clarke, 'Case Note: *Cubillo v Commonwealth*' (2001) 25 *Melbourne University Law Review* 218; Rosanne Kennedy, 'Stolen Generations Testimony: Trauma, Historiography, and the Question of "Truth"' (2001) 25 *Aboriginal History* 116; Pam O'Connor, 'History on Trial: *Cubillo and Gunner v Commonwealth of Australia*' (2001) 26 *Alternative Law Journal* 27.

<sup>56</sup> Rousso, above n 47, 56-7.

<sup>57</sup> Rousso, above n 47, 50.

<sup>58</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994) 19.

<sup>59</sup> See generally, Michael Marrus, 'History and the Holocaust in the Court Room' in Florent Brayard (ed), *Le Genocide des Juifs entre procès et histoire* (2000) and Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (1997), discussed in Lawrence Douglas, 'The Holocaust, History and Legal Memory' in Andrew Lewis and Michael Lobban, *Law and History* (2004) 408.

<sup>60</sup> Marrus, 'History and the Holocaust in the Court Room', 48 cited in Douglas, above n 59, 408.

On the other hand, Lawrence Douglas has argued that post-World War II war crimes trials and other trials associated with the Holocaust have, on the whole, demonstrated the law's capacity to represent key historical moments through the process of judgment.<sup>61</sup> 'History and law, despite differing epistemological and evidentiary conventions are ... both deeply committed to the notion of reliable proof, and many historians remain indebted to law's power as a fact-finding tool.'<sup>62</sup> There comes a point in every inquiry when the historian must draw a conclusion and take a position. Closure on one issue is necessary to aid understanding on others. New investigations require concrete premises to be properly explored. This need for certainty is an intellectual and psychological limit on perpetual questioning. Intellectually, there are only so many contingencies that can be considered before the possibility of understanding collapses under the weight of uncertainty. Psychologically, the existence of some events in the past is so intertwined with the very identity of individuals or communities that respect requires an end to doubting despite the risk of inhibiting understanding.

In 1999, historian David Irving put his version of the history of the Holocaust on trial by suing Deborah Lipstadt for defamation on the basis of allegations in her book *Denying the Holocaust: The Growing Assault on Truth and Memory* that he had deliberately distorted evidence of the holocaust in his historical research. Lipstadt's defence was the truth of her allegations. To test this defence, the court was required to assess the accuracy and truth of what Irving had written, and also whether he had the requisite intent to deceive.<sup>63</sup> Despite the evident controversy surrounding the case, the law's task was not to judge the Holocaust, but rather only the accuracy of and motivations behind an author's appraisal of the Holocaust. The ability of the judge to engage in a detailed forensic investigation of Irving's historical work with the aid of an expert historian and to conclude that Irving *had* systematically and deliberately misused the available historical evidence to deny the Holocaust has led scholars to consider whether the law might not be a useful vehicle to judge historical work in other contexts. Richard Evans, the expert historian who scrutinised Irving's work in the case has defended a role for the law in the judging of history.<sup>64</sup> Lawrence McNamara has considered whether defamation law might have a role to play in resolving disputes among historians over the extent of genocide in Australia's colonial past.<sup>65</sup> Dan Meagher has proposed that the denial of a person's history may amount to a form of racial vilification, and has considered whether the law could assess the terms of this denial

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<sup>61</sup> See generally, Lawrence Douglas, *The Memory of Judgment* (2001) and 'The Holocaust, History and Legal Memory', above n 59.

<sup>62</sup> Douglas, 'The Holocaust, History and Legal Memory' above n 59, 410.

<sup>63</sup> *Irving v Penguin Books Ltd & Deborah Lipstadt* [2000] EWHC QB 115. The decision was upheld on appeal in *Irving v Penguin Books Ltd and Deborah Lipstadt* [2001] EWCA Civ 1197.

<sup>64</sup> Evans, 'History, Memory and the Law', above n 51.

<sup>65</sup> Lawrence McNamara, 'History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past' (2004) 26 *Sydney Law Review* 353.

in a racial vilification action.<sup>66</sup> The role of history in resolving native title claims is more extensive than in any of these examples. What is required of the law is an appraisal of a community's physical and cultural connection to land over a period in excess of 200 years. The appraisal must be conducted within the timeframe of the litigation, and leads to a final and unreviewable conclusion about the extent of a community's connection to traditional lands. The next section discusses this new role for history in the law.

### III MABO AND THE NEW ROLE FOR HISTORY IN LAW

The High Court in *Mabo* acknowledged that the British colonisation of Australia was marked by the violent dispossession of Aboriginal peoples from their traditional lands. The recognition of this unjust dispossession was not directly relevant to the recognition of native title. However, it meant that the Court had to confront the fact that other rights to land had been conferred by the law without taking account of this dispossession, and the Court was left to explain how this could have happened within the introduced common law legal system. Once the historical reality was acknowledged, it was difficult for the Court not to conclude that the dispossession had occurred contrary to the law. The *Mabo* judgment was a declaration of what the legal system should have recognised the state of the common law to be at the time of first British settlement, and the declaration of the existence of a new interest in land, native title, was a recognition that some Indigenous rights to land survived this dispossession. The judgment might be interpreted then as an official expression of shame at Australia's colonial past and an attempt at partial reparation through the Court's willingness to revisit the foundation of common law property rights.<sup>67</sup>

The willingness of the law to investigate the dark aspects of colonial history and to reconsider legal rights in light of this history encouraged Aboriginal Australians to challenge other aspects of colonial law and policy in the courts. In particular, there have been attempts to establish the legal responsibility of the government for policies of forced removal of children from their families<sup>68</sup> and the commission of the crime of genocide.<sup>69</sup> These cases have taken on a social significance beyond the ascertainment of the particular rights of the parties involved. Just as *Mabo* confirmed the fact of unlawful dispossession of Aboriginal people from their land, it was hoped that these cases would confirm the existence of, and government responsibility for, other illegal acts in the past.

There is a long standing and continuing debate among historians over how Australia's colonial past ought to be represented. The debate was initiated around

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<sup>66</sup> Dan Meagher, 'Regulating History: Australian Racial Vilification Law and History Denial?' (2005) 24 *University of Queensland Law Journal* 499.

<sup>67</sup> For an analysis of *Mabo* in these terms, see Webber, above n 2.

<sup>68</sup> *Kruger v Commonwealth* (1997) 190 CLR 1; *Cubillo* (2000) 103 FCR 1.

<sup>69</sup> *Kruger v Commonwealth* (1997) 190 CLR 1; *Nulyarimma v Thompson* (1999) 96 FCR 153.

the work of Manning Clark and Geoffrey Blainey in the 1970s and 1980s.<sup>70</sup> It has taken on particular political significance with the two major political parties in Australia lining themselves up on opposite sides of the debate. One of the reasons that *Mabo* provoked such a vigorous response from politicians and historians (both those rejecting and those defending the decision), is that the High Court appeared to accept one version of Australian history over another, and when the High Court makes a pronouncement on anything, it does so with a particularly authoritative voice that is not open to the same rejection and reinterpretation as is academic historiography. From a legal point of view, then, *Mabo* settled, and thus reified, a particular version of the history of colonisation. Statements such as of Deane and Gaudron JJ that '[t]he acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation'<sup>71</sup> are unlikely ever to be revisited or retracted.

There are other examples of the reification of the historical record in native title jurisprudence. In *Wik*, historical materials were used extensively to construe Parliament's intention in the creation of pastoral leases in the 19<sup>th</sup> century, and in particular, whether pastoral leases were intended to confer exclusive possession to land on the grantee, or a right to use land subject to other interests, including Aboriginal use of the same land. Gummow J expressed concerns at this use of history to construe the terms of pastoral leases.<sup>72</sup> These concerns were taken up by Jonathon Fulcher in a critique of the High Court's use of history in that case.<sup>73</sup> In *Anderson v Wilson*, the Full Court of the Federal Court was invited to revisit the use of historical materials, but the majority refrained to do so on the ground that it was bound by the majority decision in *Wik*.<sup>74</sup>

Of course, the law's refusal to reopen the historical record on questions which have been the basis of its decisions does not stop historians and others from continuing to revisit those same questions. The version of history upon which *Mabo* is founded is still vigorously contested among historians, and *Mabo* has generated new historical debates arising directly from the reasoning in the judgment. For example, Michael Connor has argued that the High Court invented the term 'terra nullius' for the purpose of revisiting the question of sovereignty in *Mabo*.<sup>75</sup> Other historians have been vigorous in their rejection of this thesis.<sup>76</sup> The historical question at the centre of the *Wik* judgment has also led to responses by historians who have offered

<sup>70</sup> For a discussion of the history wars, see MacIntyre and Clark, above n 30 and Bain Attwood, *Telling the Truth about Aboriginal History* (2005).

<sup>71</sup> *Mabo* (1992) 175 CLR 1, 109.

<sup>72</sup> *Wik* (1996) 187 CLR 1, 182-183.

<sup>73</sup> Jonathon Fulcher, 'Sui Generis History?: The Use of History in *Wik*' in Graham Hiley (ed), *The Wik Case: Issues and Implications* (1997) 51.

<sup>74</sup> *Anderson v Wilson* (2000) 97 FCR 453, 465-466 (Black CJ, Sackville J).

<sup>75</sup> Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (2005).

<sup>76</sup> See eg, Henry Reynolds, *The Monthly*, Issue 12, May 2006, 50-52.

alternative interpretations of the extent of the rights conferred through pastoral leases.<sup>77</sup>

The innovation of *Mabo* was not so much its acknowledgement of alternative versions of Australia's colonial past, but its acknowledgement that these versions of the past were capable of influencing the development of legal norms. This left open the possibility that History could be a powerful force in shaping legal judgment. The demonstration of the close link between the establishment of legal norms and the interpretation of the facts of the past in *Mabo* was troubling for the law. Norms are supposed to be fixed and timeless. However, if they depend on a contingent and shifting past, they lose much of their stability.

To accept that rules of law can depend on facts is to invite a degree of instability. It must follow that a law declared valid can cease to be so when the material facts change .... The court therefore is rightly anxious to develop rules that will not depend on facts that are likely to change in a short period of time or from case to case, and it has also been concerned to permit the legislatures to make rules of law of some degree of generality.<sup>78</sup>

In addition to the role of history in the *Mabo* judgment itself, the case established a further role for history in the determination of the new legal right it declared to exist, native title. Native title depends for its existence on the ascertainment of particular conditions in the past (a traditional connection to land) that have continued from the time of the assertion of British sovereignty through to the present.<sup>79</sup> The establishment of native title was directly dependent on an historical investigation into these conditions. This second use of the past accepts that there is an intrinsic connection between events of the past and rights in the present. This is both philosophically and politically contested.<sup>80</sup> Also, it requires an ability to represent events in the past with sufficient accuracy and certainty for legal rights to be attached to them.

To determine a native title claim, the law had to draw on a past not found in the law's usual resources of memory (previous pronouncements of the law) but in a vast network of archival and other sources outside of the law. Native title required the law to turn its gaze to what had *survived* this legal reality. It framed Indigenous rights as a question of fact and not of legal doctrine; of history and not of British sovereignty. This is not to say that sovereignty is not still central to the framework of Indigenous rights, only that it is not finally determinative of those rights. Prior to *Mabo*, the legal assumption was that the assertion of British sovereignty had

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<sup>77</sup> See, especially, Damien Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia' (2003) 1 *History Compass* 1; Michael Stuckey 'Not by Discovery but by Conquest: The Use of History and the Meaning of "Justice" in Australian Native Title Cases' (2005) 34 *Common Law World Review* 19.

<sup>78</sup> Leslie Zines, *The High Court and the Constitution* (1997) 475-6.

<sup>79</sup> *Yorta Yorta* (2002) 214 CLR 422.

<sup>80</sup> Compare Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4 and Duncan Ivison, *Postcolonial Liberalism* (2003) 99-101.

extinguished all Indigenous rights to land. Once *Mabo* proved this assumption to be false, the facts of Aboriginal survival and continuing connection to land became the focus of the native title claims process.

Native title is based on the existence within an Aboriginal community of traditional laws and customs that have continued from the time of British sovereignty was asserted to the present. The joint judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* posited sovereignty as the key moment in Indigenous and non-Indigenous legal relations.<sup>81</sup> No new native title rights and interests could be created after the assertion of British sovereignty as the transfer of sovereignty had also removed any capacity for Indigenous law to create new rights.<sup>82</sup> The assertion of British sovereignty had this impact on Indigenous land rights as a matter of law *regardless* of what was happening as a matter of historical fact in the early years of colonisation.

There is a clear distinction between traditional laws and customs, which can evolve and still be the foundation of native title rights, and native title rights themselves, which are fixed at the moment of sovereignty.<sup>83</sup> Native title claims require parallel inquiries into the nature and extent of Indigenous relationships to land in the present and at the time of the assertion of British sovereignty. However, it is the pre-sovereignty nature and shape of the rights that indicate their fullest extent. The only concession to change over time is that the rights may diminish in extent and still be partially claimable. The more laws and customs evolve, and the less they conform to an original form of those rights, the less value they have as proof of native title. Any further evolution in Indigenous land rights must be through legislative change. In this way, the law is, as Brennan J stated in *Mabo*, a ‘prisoner of its history’.<sup>84</sup>

To establish relationships to land in the past back to the time of the assertion of British sovereignty, claimants have drawn on the work of anthropologists, historians, genealogists, linguists and archaeologists. In terms of history, claimants need to present to the courts a comprehensive historical analysis of the claim area, and it must do so within the constraints of the rules of evidence. Under the hearsay rule, archival material cannot be used to testify to the truth of a proposition since its reliability cannot be tested through the interrogation of a witness testifying to its accuracy.<sup>85</sup> For much of the documentary material relevant to native title claims there is no one alive to provide this testimony. Parliament responded to this problem in the original version of the *Native Title Act* 1993 by exempting native

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<sup>81</sup> *Yorta Yorta* (2002) 214 CLR 422, 443 (Gleeson CJ, Gummow and Hayne JJ).

<sup>82</sup> *Yorta Yorta* (2002) 214 CLR 422 443 (Gleeson CJ, Gummow and Hayne JJ). See also, *Jango v Northern Territory of Australia* [2006] FCA 318 (Unreported Sackville J, 31 March 2006) [192].

<sup>83</sup> *Yorta Yorta* (2002) 214 CLR 422, 443 (Gleeson C.J., Gummow and Hayne JJ).

<sup>84</sup> *Mabo* (1992) 175 CLR 1, 29 (Brennan J).

<sup>85</sup> *Evidence Act* 1995 (Cth) s 59.

title claims from the strict rules of evidence.<sup>86</sup> Amendments to the *Native Title Act* in 1998 took away the exemption.<sup>87</sup>

In practice, judges have found various ways to overcome the constraints on the admissibility of historical sources within the rules of evidence. With some notable exceptions,<sup>88</sup> they have considered oral histories of events outside the living memory of witnesses to be evidence of significant weight.<sup>89</sup> They have also increased the significance of historical evidence by accepting that historians are persons with ‘specialist knowledge’ under s 79 of the *Evidence Act* (1995). Under s 79, the historian’s evidence is admissible as evidence of an opinion, and not evidence of a ‘fact’. Judges are careful not to accept the conclusion of historians as fact, especially in relation to any opinions they express on the ultimate questions facing the court for decision (such as the nature and extent of a claimant group’s connection to the claim area since the time of the assertion of British sovereignty). However, judges freely draw on the archival sources in historians’ reports to construct their historiographies of the claim area in their judgments.<sup>90</sup> The liberal view towards the admissibility of documentary and oral history has created its own problems. For one thing, when these two sources of evidence are in conflict, judges have to choose between them, without the principles of evidence to provide criteria for the choice. Some judicial decisions on the relative weight of oral and documentary evidence have been heavily criticised as a result.<sup>91</sup>

The native title context was the first time historians had been systematically treated as experts in a judicial process in Australia. In 1998, Young J discussed the use of historians as experts outside the native title context in this way: ‘As far as counsel and I are aware ... the problem of an alleged expert giving evidence of what life was like 100 years ago – has not come before the courts for decision.’<sup>92</sup> And yet, in the native title claims process this is precisely the task historians are asked to perform in their expert reports.

[T]he issue [historians] are called upon to judge ... involves a global judgement over an almost unlimited range of evidence. Here the historian is not attesting to ‘facts’ – at least in the sense of discrete actions or sayings for which there is specific testimony – but offering a judgement based, possibly, on acquaintance with a range of ‘facts’.<sup>93</sup>

<sup>86</sup> *Native Title Act* 1993 (Cth) s 82.

<sup>87</sup> *Native Title Amendment Act* 1998 (Cth) s 82.

<sup>88</sup> *Yorta Yorta* [1998] FCA 1606, [22], [106] (Olney J). See also, *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185 (McEachern CJ).

<sup>89</sup> *Ward v Western Australia* (1998) 159 ALR 483, 526, 543-544 (Lee J).

<sup>90</sup> See for example, *De Rose v South Australia* [2002] FCA 1342, *Yarmirr v Northern Territory (No 2)* (1998) 82 FCR 533, *Daniels v Western Australia* [2000] FCA 1356.

<sup>91</sup> See eg, Reilly, ‘The Ghost of Truganini’, above n 10; Ritter and Flanagan, above n 10.

<sup>92</sup> *Bellevue Crescent v Maryland Holdings* (1998) 43 NSWLR 364, 371.

<sup>93</sup> Graeme Davidson, ‘History on the Witness Stand’ in Iain McCalman and Ann McGrath (ed), *Proof and Truth: The Humanist as Expert* (2003) 53, 62.

The use of historians in the native title process has led to the production of a body of literature among historians considering their experiences as expert witnesses in the native title claims process before the Federal Court.<sup>94</sup> It has also led to critiques of the adequacy of judicial use and interpretation of historical material.<sup>95</sup>

With historical evidence being admitted by the courts in exception to the hearsay rule, the main issue is the weight to be attached to it. In relation to historical evidence, there are several issues of weight that have commonly arisen in cases including, whether inferences and conclusions in historians' reports are supported by the archival material they purport to rely on, and whether historians have been even-handed in their appraisal of the archival sources.<sup>96</sup> Academic historians who have been involved in the native title litigation process have reported being subject to an unprecedented level of critical scrutiny of their work through the process of cross-examination.<sup>97</sup>

In *Wik*, Gummow J expressed a concern, stemming from *Mabo*, that the law has not developed adequate criteria for the use of history in the creation of legal norms. 'There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms.'<sup>98</sup> Gummow J's reference to an 'established taxonomy' suggests that the relationship can be resolved through the creation of a list of principles for how the two disciplines relate. The taxonomy would seem to be internal to law, in essence a list of legal principles for how to use history in the recognition of legal norms. Having cast doubt on the possibility of creating a taxonomy for uses of history, Gummow J suggests that however principled and ordered its use in judicial determination, history might be nothing more than a 'rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts'.<sup>99</sup> Michael Stuckey is critical of Gummow J's call for a taxonomy to regulate the uses of history. Courts, he argues,

<sup>94</sup> See, in particular, Paul and Gray, above n 9; Choo and Hollbach, above n 11; McCalman and McGrath, above n 11.

<sup>95</sup> Critiques have focussed in particular on Olney J's use of historical materials in *Yorta Yorta* [1998] FCA 1606. See eg, Ritter and Flanagan, above n 10; Reilly, 'The Ghost of Truganini', above n 10; Valerie Kerruish and Colin Perrin, 'Awash in Colonialism: A Critical Analysis of the Federal Court Decision in the Matter of *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria and Ors* (1998)' (1999) 24 *Alternative Law Journal* 3. There are also critiques of the decisions of the Full Court of the Federal Court and the High Court upholding Olney J's judgment. See eg, Kirsten Anker, 'Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*' (2004) 28 *Melbourne University Law Review* 1; Reilly and Genovese, 'Claiming the Past' above n 10.

<sup>96</sup> See eg, the cross-examination of the historian Christine Choo in *Ben Ward and Ors v The State of Western Australia* WAG6002 of 1996 and *Clarrie Smith v The State of Western Australia* WAG72-75 of 1998.

<sup>97</sup> See Hal Wootten 'Conflicting Imperatives: Pursuing the Truth in the Courts' in Iain McCalman and Ann McGrath, *Proof and Truth: The Humanist as Expert* (2003) 15; Davidson, above n 93.

<sup>98</sup> *Wik* (1996) 187 CLR 1, 182.

<sup>99</sup> *Wik* (1996) 187 CLR 1, 183.

should adopt ‘a broadening, rather than a narrowing, attitude towards historical perspectives’.<sup>100</sup>

One of the key dilemmas in establishing a taxonomy of principles for the use of history in law is that, at the beginning of the 21<sup>st</sup> century, there is no settled version of history that the law can unquestioningly draw upon. At the core of History, there is an uncomfortable set of philosophical questions about what the past is, and how it can be understood and interpreted through the medium of written records and oral testimony. The law must be clear of its own motivations for accessing and using the past. How the law interrogates the past, and therefore how it draws on the historical record, will necessarily depend on what it wants from the past. In turn, what the law wants from the past determines the methods it uses to access it.

Stuckey might be right to be sceptical of any judicial attempt at forming a taxonomy of principles for the use of history in law. However, there seems good sense in at least clarifying the relationship between law and history and how and why each discipline accesses the past.

#### IV DANGERS OF USING HISTORY IN LEGAL RESOLUTION – REMEMBERING AND FORGETTING IN *MABO*

One explanation for the High Court’s revision of the common law in *Mabo* is that by the end of the 1980s, the weight of historical evidence of what occurred in the process of colonisation in Australia was so discordant with the official legal story that the High Court of Australia felt compelled to reinterpret the common law in light of the new orthodoxy.

The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from those past injustices. In these circumstances, the Court is under a clear duty to re-examine [the law].<sup>101</sup>

In fact, the discord that was generated through access to sources external to law has also led to a reappraisal of the legal sources themselves. Read from another perspective, as scholars such as Henry Reynolds have revealed, the legal sources themselves suggested an alternative version of the story of the development of property rights in Australia.<sup>102</sup> Reynolds’ work has come under particular scrutiny as

<sup>100</sup> Stuckey, above n 77, 37.

<sup>101</sup> *Mabo* (1992) 175 CLR 1, 109 (Deane and Gaudron JJ). See also, Brennan J at 58: ‘[T]o reject the theory that the Crown acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history.’

<sup>102</sup> See eg, Henry Reynolds, *The Law of the Land* (3<sup>rd</sup> ed, 2003); Bruce Kercher, ‘The Recognition of Aboriginal Status and Law in the Supreme Court of New South Wales under Forbes CJ, 1824-1836’ in A R Buck, John McLaren and Nancy E Wright (eds), *Land and Freedom: Law, Property and the British Diaspora* (2001) 83; Andrew Buck, ‘Attorney General v Brown and

a result of his influence on the High Court in *Mabo* and *Wik*.<sup>103</sup> A number of commentators have challenged the High Court's easy acceptance of Reynolds' version of the history of the introduction of British land law to Australia.<sup>104</sup> More interestingly for the purposes of this paper, Bain Attwood has criticised the role historians have played in writing accounts of this period that are tailored to assisting the resolution of claims. His criticism has been directed at Reynolds, in particular. Attwood has described Reynolds' work pejoratively as 'juridical history'. He uses this term to draw a distinction between history used in a legal context and academic history.<sup>105</sup> Attwood is concerned that the 'juridification' of history over-simplifies the historical record and therefore limits the ways we engage with the past and the lessons it contains.

We require accounts that reveal the limits of the Australian past in respect of the treatment of Aboriginal people, thus allowing us to acknowledge that there is little to redeem it and so enabling us to recognise that few of the answers to continuing racial inequality lie there ... By excavating the complex messiness of the past in the present rather than evading it, one can produce histories that might have more useful political and social outcomes than ones that try to use the past in the service of simplistic contemporary political and legal narratives.<sup>106</sup>

Attwood identifies a central tension in the way Law and History understand and write about the past. For History, the desire for better understanding means there can be no end to the questioning of the past, and certainly no romanticising of it. David Thomson puts this idea well:

The historian, unlike judge or jury, must listen to every sort of gossip and second hand hearsay, and must train himself to discount them as such whilst sifting from them any light that they may throw upon the facts which he is seeking to establish. ... [H]e is also the 'investigator' – the detective compiling the evidence. He is checked only by his own conscience, and by the ultimate appeal which will go before his

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the Development of Property Law in Australia' (1994) 2 *Australian Property Law Journal* 128.

<sup>103</sup> In *Mabo* (1992) 175 CLR 1, Reynolds' *The Law of the Land* (2<sup>nd</sup> ed, 1992) is cited by Deane and Gaudron JJ on three occasions (107, 142) and by Toohey J once (181). In *Wik* (1996) 187 CLR 1, his article with James Dalziel, 'Aborigines and Pastoral Leases – Imperial and Colonial Policy 1826-1855' (1996) 19 *University of New South Wales Law Journal* 315 is cited by Toohey J, 108. 'The *Mabo* Judgment in the Light of Imperial Land Policy' (1993) 16 *University of New South Wales Law Journal* 27 is cited by Kirby J, 207. *Aboriginal Sovereignty: Reflection on Race, State and Nation* (1996) is cited by Kirby J, 214. 'Native Title and Pastoral Leases' in M A Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) is cited by Kirby J, 226; and *Dispossession. Black Australians and White Invaders* (1989) is cited by Kirby J, 230.

<sup>104</sup> See eg, Ward, above n 77; Stuckey, above n 77; Bain Attwood 'The *Law of the Land* or the *Law of the Land?*: History, Law and Narrative in a Settler Society' (2004) 2 *History Compass* 1.

<sup>105</sup> Attwood, 'The *Law of the Land* or the *Law of the Land?*' above n 104, 2.

<sup>106</sup> Attwood, 'The *Law of the Land* or the *Law of the Land?*' above n 104, 19. See also, Attwood, *In the Age of Mabo*, above n 2, introduction.

colleagues and successors. He knows they will not be slow to demolish his evidence and his arguments if they possibly can.<sup>107</sup>

In the distinction between real and other history, Attwood seeks to promote accounts of the past that reveal its 'complex messiness'. It might be argued in response to Attwood that Reynolds contributed to an understanding of the complexity of the past by challenging an uncomplicated story of legitimate dispossession of Aboriginal peoples from land. In law, propositions are presented to the courts in terms that aid the courts in the process of judgment. Whereas for Attwood, if law and history are to converge, it must be on history's terms, Reynolds recognised the needs of the law, and relied in his historical work on sources that the law also recognised as authoritative. But according to Attwood, because Reynolds' historical account of the development of property law omits some of the nuance and complexity of that history, he is writing bad history.<sup>108</sup>

Attwood's critique of Reynolds points to a broader concern about law's use of history. In law, remembering is necessary to invoke the criteria for resolution. The law constantly reinforces the origin of its authority, be it in a constitution, a statute or an established rule of the common law. Remembering is also necessary for ordering the disputed facts into a uniform and coherent narrative to which the appropriate legal rule can be applied. That which is remembered is vivid, and cannot help but be the subject of judgment. But successful resolution also requires forgetting. In fact, remembering is only possible in conjunction with forgetting.<sup>109</sup> A trace or image can only be remembered against the backdrop of other traces being forgotten. Heidegger goes further, stating that '[j]ust as expectation is possible only on the basis of awaiting, remembering is possible only on the basis of forgetting, and not the other way around'.<sup>110</sup>

For the law, if an event is not central and therefore does not need to be endured, then it is erased from the legal equation. This forgetting occurs in various ways. The process of filtering out unreliable, inadmissible and insufficiently relevant facts renders these facts invisible to the law. The privileging of some facts over others in the legal narrative erases still more facts. The final judgment is a record of the resolution that is binding on the parties. To be effective as a resolution, the grievance must be forgotten, as must any other versions of events that threaten to keep the grievance alive.

Calling for moral, symbolic, material or judicial reparation after the heat of the moment implies that debts always have their price. Once paid, the debt should be settled, so that one can henceforth speak of forgetting, forgiving, or simply turning the page.<sup>111</sup>

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<sup>107</sup> Thomson, above n 14, 42

<sup>108</sup> Attwood, 'The *Law of the Land* or the Law of the Land?', above n 104, 19.

<sup>109</sup> Ricœur, above n 34, 442.

<sup>110</sup> Martin Heidegger, *Being and Time* (1927) 312 cited in Ricœur, above n 34, 442.

<sup>111</sup> Rousso, above n 47, 23.

The narrative of judgment is, then, an official record of what can be (and has already been) forgotten. Of course, the forgetting that is required in legal decisions is vulnerable to the unforgettable nature of the claims they require to be forgotten. Law's judgments are only as final as law's resolve to maintain its internal view of the past. *Mabo* signifies a limit to law's ability to maintain such a view, and the possibility of revisiting that which had been forgotten. Just as remembering is limited by the inevitability of forgetting, forgetting is limited by the power and insistence of remembering.

Forgetting can be active or passive. Prior to *Mabo*, the phenomenon of Aboriginal dispossession from land was a passive forgetting. The law removed the traces of the fact of dispossession by reinforcing the legitimacy of a claim to absolute sovereignty through which the Crown obtained full radical and beneficial title to the land. Traces of an alternative story that continued to exist, such as cases affirming the operation of Indigenous law (and thus a form of Indigenous sovereignty) when an Aboriginal person committed an offence against another Aboriginal person, were not recalled.<sup>112</sup> The act of remembering in *Mabo* opened up the possibility of an active forgetting (remembering to forget). Once the High Court was called upon to reappraise the terms of British colonisation in Australia and the lawfulness of Aboriginal dispossession in particular, it was required to pass judgment on questions that, while they remained political, could be continuously reappraised and contested. It was their unresolved nature which kept the memory strong. The *Mabo* resolution reified a particular form of remembering. The reified nature of what is remembered means it will fade over time having been deprived of what Ricœur calls the 'benefits of dissensus'.<sup>113</sup> That is, the benefit that is entailed in the constant assertion and counter-assertion of an interpretation of events that supports a claim of rights.

Forgetting can be of varying intensities. There is the total erasure of all traces of a phenomenon, so that it can never be recalled again; there is the forgetting associated with putting a memory aside, so that it is still available for recall, but is not recalled; and there is the forgetting associated with a lack of recognition of a phenomenon when it is in fact recalled. Associated with these types of forgetting, Ricœur

<sup>112</sup> A research project conducted by the Division of Law at Macquarie University has led to the publication of large numbers of cases in the Supreme Court of NSW from 1788 to 1899. See, Division of Law, Macquarie University, *Decisions of the Superior Court of New South Wales, 1788-1899* (2006) <<http://www.law.mq.edu.au/scnsw/>>. Among the decisions are a number of cases involving Aboriginal defendants in which it was held that certain disputes among Aboriginal peoples were governed by Aboriginal law. See *R. v. Ballard or Barrett*, Supreme Court of New South Wales, Forbes CJ, 21 April 1829, published in *Sydney Gazette*, 23 April 1829; *R v Murrell and Bummaree*, Supreme Court of New South Wales, Forbes CJ, 5 February 1836, published in *Sydney Herald*, 8 February 1836; *R v Bonjon*, Supreme Court of New South Wales, Willis J, 16 September 1841, published in *Port Phillip Patriot*, 20 September 1841.

<sup>113</sup> Ricœur, above n 34, 455.

describes three techniques or strategies for forgetting: blocking memory, manipulating memory and amnesty, which is a commanded forgetting.<sup>114</sup>

*Mabo* is an example of all these types of forgetting, and employs all these techniques. It represents the limit of the law's remembering. Any memories associated with this past that might challenge the 'skeleton of principle' of property law in Australia are blocked. *Mabo* manipulates the memory of how dispossession occurred (not as a matter of conquest which is necessarily incomplete, but as a matter of settlement despite the apparent rejection of the doctrine of terra nullius<sup>115</sup>) and then renders unquestionable any challenge to the manner of the importation of colonial law through the invocation of the 'act of state' doctrine.<sup>116</sup> *Mabo* is also an amnesty. It is a commanded forgetting, based on a reciprocal giving. The law confers the recognition of native title on the condition that Aboriginal Australians exculpate the law from any further responsibility for their dispossession from land.

[I]t is appropriate to identify the events which resulted in the dispossession of the indigenous inhabitants of Australia, in order to dispel the misconception that it is the common law rather than the action of governments which made many of the indigenous people of this country trespassers on their own land.<sup>117</sup>

Finally, *Mabo* is the high point of Indigenous claims to land, and native title is the vehicle for finally resolving Indigenous land rights issues and for reinstating certainty to questions of ownership and occupation of land. More extensive claims, such as to sovereignty, are erased.<sup>118</sup>

The forgetting in *Mabo* is more than the forgetting that occurs with the passing of time. *Mabo* demands to be the only remembrance of the issues it stands for. Remembering is limited to the final and unalterable text. This is a phenomenon of all historiography. Only when records are committed to text is the past firmly set apart from the present.<sup>119</sup> As Michel de Certeau says 'The dear departed find a haven in the text because they can neither speak nor do harm anymore. These ghosts find access through writing on the condition that they remain forever silent.'<sup>120</sup> Legal judgment is a particularly powerful tool for silencing those it speaks

<sup>114</sup> Ricœur, above n 34, 443-56.

<sup>115</sup> David Ritter, 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5, 6; Robert Van Krieken, 'From *Milirrpum* to *Mabo*: The High Court, Terra Nullius and Moral Entrepreneurship' (2000) 23 *New South Wales Law Journal* 63, 69-73.

<sup>116</sup> *New South Wales v The Commonwealth* (1975) 135 CLR 337, 388 (Gibbs J), cited with approval in *Mabo* (1992) 175 CLR 1, 31 (Brennan J). See also, in *Mabo* (1992) 175 CLR 1, 95 (Deane and Gaudron JJ). For a critical analysis of the 'Act of State' doctrine, see Ian Hunter, 'Native Title: Acts of State and the Rule of Law' in Murray Goot and Tim Rowse, *Make a Better Offer: the Politics of Mabo* (1994) 97.

<sup>117</sup> *Mabo* (1992) 175 CLR 1, 69 (Brennan J).

<sup>118</sup> *Coe v Commonwealth* (1993) 118 ALR 193.

<sup>119</sup> Lowenthal, above n 14, 231.

<sup>120</sup> Michel de Certeau, *Writing of History* (Tom Conley trans, 1988) 2 [trans of: *L'écriture de l'histoire*].

for, as it demands obedience to its judgments. Paradoxically, then, it is that which is yet to be resolved by the law that still has the potential to be remembered. Bringing a matter before the law, especially a matter as unresolved and unresolvable as Indigenous rights, is to remind the law to forget.