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Introduction

Iain McCalman and Ann McGrath

Visitors to the National Museum of Australia’s repository can encounter a crazy mechanical sculpture, entitled ‘The Law Machine’, constructed by political cartoonist Bruce Petty. A distinctive lawyer’s wig, copperplate writing on wood, antique money, musical instruments, knives, forks and a range of old and new everyday objects are loosely assembled into an anthropomorphic machine evoking centuries-old traditions. When the handle of this unique apparatus is turned, the adversarial system pits defence against prosecution to process money, persuasion, judgement, penalties and human rights in an apparently random fashion. Consuming at the wig end and excreting jurisprudential outcomes at the other, Petty’s Law Machine satirises the legal system’s unclear logic and the icons of its authority.

In Proof & Truth: The Humanist as Expert, humanists, legal scholars and practitioners inquire into the complex workings of the real law machine in relation to the sometimes incompatible expertise of lawyers and humanists. Legal experts are, by nature, ‘at home’ with the mechanics of the judicial system and in tune with its logic and priorities. This is not necessarily the case for historians, anthropologists and other humanist experts. For them, the unfamiliar judicial terrain can be confusing and difficult to navigate. Yet humanist scholars and lawyers are alike in their concern with proof and truth; they share a passion in seeking these two holy grails. However, as many of the contributors in this collection demonstrate, lawyers and scholars can have quite different understandings of these core ideals of ‘proof’ and ‘truth’.

This book explores, first, how these fundamental terms operate as distinctive concepts in the historically evolving contexts of the courtroom and the academy. And, perhaps more importantly, what happens when the two approaches collide — when a humanist appears as an expert witness in a court of law. As many of the cases discussed in the following chapters reveal, ‘collision’ is an apt word for these encounters are often mutually problematic. The lawyer’s ‘facts’ do not necessarily sit comfortably with the scholar’s ‘truths’. The finely-tuned arguments and scholarly findings of the humanist
can seem impossibly slippery when uprooted from their normal context and proffered as evidence in the courtroom. With reference to many colourful, well-known and sometimes landmark legal cases, our collection aims to elucidate the weak spots and incongruities between the law and the humanities and, it is hoped, to point the way to a set of practices that will enhance the truth-seeking values and missions of both professions.

Whether located in Europe or the British diaspora, the law and the humanities are two very different intellectual frameworks, with disparate functions, purposes and cultures. The law and its practitioners go about ascertaining 'truth' and 'proof' according to a long western tradition and specific precedents. Similarly, humanities scholars are essentially concerned with 'truth' and its indicators, the 'proof'. In this volume we often refer to humanities scholars as 'humanists' to remind ourselves that the disciplines arise out of a long European humanist tradition and concern human society and action.

Apparent similarities between the law and the humanities can be deceptive. Deploying common terms such as 'truth', 'proof' and 'evidence', each group mistakenly and confusingly assumes shared meanings. Rarely do they engage with each other about how the conditions of usage, institutional aims and traditions can prove to be poor matches. Consequently, when legal cases or related enquiries demand that lawyers and humanists work together, they often operate at cross-purposes, without any means of satisfactory communication, let alone a useful level of mutual insight and understanding.

Definitions of 'proof' and 'truth' differ with changing cosmologies, times and cultures. In a rationalist age, 'truth' had a particular reliance upon tangible 'proof', whereas in a more religious age, 'truth' relied upon authenticated interpretations of religious 'reality'. In a scientific era, the methods of 'proof' rely on the latest digital technologies, forensic and medical experiments. But no era is without its controversies and contestations over truth. The twenty-first century remains an era where humanists are making greater efforts to move away from Eurocentrism towards cross-cultural understandings. In such scholarship, 'truth' exists in multiples rather than a singular unit. In other words, the 'whole truth' might not exist as one.

Post-modern critiques have challenged the universality of 'truth' and 'relativism': different cross-cultural, gendered and other perspectives are increasingly accepted amongst scholars and amongst the public at large. New legal scholarship also embraces such frameworks. While the foundations of humanist 'truth-claims' have been significantly shaken, the foundations of the courts' 'truth-claims' would appear to be holding firm. But are they? Possibly the law has always been more sceptical and careful about its fallibility in ascertaining truth.

Proof & Truth: The Humanist as Expert provides a forum for practitioners and scholars in the law and the humanities to come together to engage in a potentially enlightening — if not reforming — dialogue. This collection owes its origins to the Australian Academy of the Humanities' annual symposium of late 2002. The need for such a forum was originally inspired by a panel on native title at an Australian Historians' Association Conference in Adelaide in late 2000, which grew into a wider discussion about the status of the discipline of history as a field of 'expertise' as defined by the courts. The President of the Academy, Iain McCalman, and Ann McGrath, then the Director of the Society and Nation program at the National Museum of Australia, were invited to act as co-convenors of the forum. For McGrath, her first-hand experience as an expert witness in Northern Territory Aboriginal Land Claims, in Gunner & Cubillo v the Commonwealth of Australia (a federal test case for the stolen children), and her role as History Coordinator of the Royal Commission into Aboriginal Deaths in Custody, raised a range of pressing questions relating to humanities scholarship and the law. Professor Iain McCalman extended the program's parameters to mould a symposium that would attempt to confront the widest issues facing the humanist disciplines today, encouraging comparative reflection upon the intersections between the law and different genres of humanist expertise, including philosophy, psychology, and the sciences.

Humanist scholars have a range of venues in which they practise their respective disciplines, where they may inform and influence the wider society, including the judges and lawyers serving in the courts. They publish in scholarly journals or popular magazines; they write books and debate issues at conferences. They give lectures and conduct seminars for students and they engage in public
forums, write opinion pieces in newspapers, serve on committees, shape or criticise government policy and participate in radio, television, film, digital, multi-media and museum exhibitions. In venues where there is less autonomy, fewer senior humanists are to be found. Rightly or wrongly, they fear that the integrity of their work may be jeopardised by oversimplifications, conflicts of interest or external pressures. Unfortunately, the courts loom large in this regard. Humanists who act as experts often feel that they are subjected to exceptional efforts to discredit the epistemological bases of their professional disciplines. When first approached by a lawyer to appear in a court-case, many humanities scholars jump at the opportunity, but after a brutal ‘blooding’ in the witness box they rarely repeat the experience.

The courts are immensely influential, if not hegemonic venues in western society. They are arbiters of justice that not only punish but also redistribute wealth and enlarge or qualify individual and collective rights and freedoms. If humanists are serious about public outreach beyond the academy, they should be exploring ways in which they can make more useful and well-targeted contributions towards informing the courts. If lawyers are serious about getting the best proof and getting as close as they can to the truth, we believe they should consider better ways to work with humanist experts and humanities expertise. In Proof & Truth we explore the cultural and performative venues of the courts and consider both who and what should be changing — the humanists, the lawyers, or the court system itself.

In recent times, a number of socially significant cases have challenged the preconceptions and disciplinary parameters of humanist scholars, and have challenged the courts equally. Cases relating to indigenous peoples who occupied lands prior to the arrival of British law pose special difficulties not only to Australian and international jurisprudence but also to humanities scholars, whose disciplines are often imbued with Western and imperial associations. The High Court’s Mabo judgment in 1992 overturned previous rulings, such as the Blackburn Judgment, and ruled that native title rights existed for Indigenous Australians. In overturning the doctrine of terra nullius, Mabo effectively rewrote Australian history.

Such judgments indirectly drew upon new humanities scholarship, most particularly the pioneering work of Henry Reynolds. When the legal scholar Garth Nettheim of the University of New South Wales convened a meeting of the legal fraternity to hear Reynolds’ latest, then unpublished, historical findings, more than one senior lawyer accused him of not understanding the law. Reynolds’ well-publicised book Law of the Land (1987) directly and convincingly challenged legal decisions on Indigenous land ownership, asserting these were based upon false premises about the history of British law, colonialism and governance. In 1992, in the wake of the Mabo decision and post-modernism’s questioning of ‘truth’, Reynolds urged historians to forget their ‘epistemological angst’ and assert in the courts the authority of their discipline, with its powerful truth claims. Over the next 11 years, history as a profession has, however, been subdued in its participation in the native title process, leaving most of the work to anthropologists. Despite this, it is no coincidence that high-profile scholars of Indigenous history have been subjected to well-publicised questioning in regard to historical facts and political allegiances and how they affect the proof and the truth.

Being about engagement with the human, humanities studies are enterprises requiring passion and imagination, and they are often driven by a commitment to justice. ‘Subjectivity’ versus ‘objectivity’ can therefore be called into question, just as — in the sphere of the law — can the distinction between ‘expert opinion’ and judgement, the realm of judge or jury. While in the law, ‘subjectivity’ is equated with partisanship, in the humanities this is not necessarily the case, because elements of subjectivity that permeate selection and interpretation are viewed as inevitable and, when properly controlled, even potentially enriching. Hence ‘reflexivity’ or reflecting upon the author’s predispositions and methodologies has been accepted by many, though not all, humanists.

The humanities itself is a broad church, including such disciplines as anthropology, musicology, politics, sociology, psychology, history, and other disciplines that might simultaneously be classed as ‘social sciences’. Generally the humanities encompass the disciplines concerned with researching, analysing and interpreting various facets of the human condition. Theoretical insights, logical argument, evidence and narrative combine to establish ‘proof’ and ‘truth’. Yet while humanists may be authoritative on themselves and their field of expertise, they are sometimes not so adept at articulating and defending these when on alien turf — and they can fail spectacularly when doing so in court.
Law also ranges broadly, and divergent styles of practice have been adopted between civil law, criminal law, and between tribunals such as land claims and native title. Styles of practice also vary between individual practitioners. The same holds true of humanists. While traditions in both spheres may shape present practice, each discipline and each court is also subject to change over time and to pragmatic modifications designed to meet new kinds of cases and examples. The power of sharp debate, convincing logic and 'irrefutable' facts combine with a reliance upon a performative mix of the spoken and the written word governed by rules of evidence. Both fields rely on 'precedents'—just as humanists draw on previous scholarship to shape their facts and conclusions, so lawyers rely on earlier arguments and judgements to build new cases.

So, while proof and truth continue to constitute the bedrock of both the law and the humanities, their geomorphology is often fractured and unstable. The law and humanities are both fields of enquiry that seek evidence from which to make a judgement. However, the paths they take towards this end tend to diverge. The methods, processes and techniques used to arrive at 'proof' and their purposes in ascertaining 'truth' are distinct.

In this collection, *Proof & Truth: The Humanist as Expert*, each chapter grapples with the nature and relations between proof, truth, law and humanities in distinctive, often path-breaking ways, providing a wide range of perspectives and including a diversity of practical experience and disciplinary knowledge and expertise. Our book is divided into four main sections: the Humanities and the Law; History on Trial; Truth, Facts and Memory; Truth and Institutions.

The first two chapters provide broad-ranging surveys of the nature and relationship of the law and the humanities. Locating humanists and lawyers as natural allies in a quest for justice, Hal Wootten QC offers a magisterial and incisive overview. Differentiating the humanities from the law, which he classifies as a 'profession' or practical vocation, he argues that the professions not only require specific skills, but also hold special responsibilities beyond those of the humanities. Wootten contends that while the law is indeed committed to finding 'the truth', its duty to finalise disputes provides limited time for its truth quests. Furthermore, the courts privilege procedural justice above the search for truth. The expert witness's evidence must be subjected to tests to hold up to the burden of proof and conform to the rules of evidence. While rejecting any attack on empiricist and rationalist thinking within legal frameworks and dispute settling, he acknowledges that the rules of the court are under continuing criticism, review and amendment. Wootten acknowledges the significant involvement of humanities scholars from anthropology, linguistics, history and archaeology in recent cases relating to the treatment of Indigenous people, and he recognizes the understandable dissatisfaction of such experts. Arguing that the problems lie not with the legal procedures but with the structural framework—the nature of dispute settling and the laws themselves—he proffers some positive alternatives, including more appropriate forums for deciding redress.

Historian Graeme Davison describes lawyers and historians as 'intellectual cousins'. Indeed, Marc Bloch, one of the Annales School founders, thought of the historian's role as similar to a 'grumpy examining magistrate' relentlessly cross-examining witnesses. While Bloch also pointed out that the scholar's role was 'understanding' and the lawyer's was 'justice', Davison explains how history and law often overlap, such as in investigations of Nazi war crimes. He offers a range of insights from the Mabo judgement, Gunner & Cubillo, the Waitangi tribunal (Aoteoroa/New Zealand), the Sears Roebuck case before the Equal Employment Opportunity Commission case in the United States and that of holocaust denier David Irving. Drawing on such examples, Davison evaluates the weightings of 'facts' and 'judgement', advocacy and expertise that might confront a historian in the court. Concluding that the law is more about civil order than eliciting truth or imaginatively exploring the human condition, he contends that the historian in pursuit of common political or moral goals must play by the lawyer's rules. Wootten and Davison both discuss the limitations of historical practice in the courts and agree that adopting relativist views will not make experts helpful in court.

Section Two opens with lawyer Mark Dreyfus QC examining the experience of historians in court—still a relatively rare occurrence in Australian litigation. He provides valuable summaries of a range of judgements concerning the use of historical expertise in courts, most particularly Gunner & Cubillo and various Australian native title cases. He also considers the implications of a libel action by British historian David Irving against American historian Deborah Lipstadt and her publisher. Elucidating the tensions be-
tween historical and legal method, he concludes that historians in court will always be in an environment structured to be essentially unreceptive to their methods. However, in contexts that test historical issues of ‘truth and lies’, he believes the courts can function as a very public vehicle for this truth telling.

Historian Ann Curthoys and legal scholar and historian Ann Genovese investigate why historians have been ‘having a hard time in court’, and engage with Dreyfus on the role of humanists in the Gunner & Cubillo and native title cases before inspecting another case, Edwina Shaw & Anor v Charles Wolf & Ors (1998) which involved a court ruling on Indigenous identity. The latter leads them to a consideration of ‘basal facts’ for a judge versus the role of ‘facts’ for a historian engaged in humanistic, narrative-based rather than scientifically-based practices. They conclude that their interdisciplinary methodology should help clarify what happens when history’s narratives are on trial and become rewritten as law’s stories.

Economic historian Arthur Ray uses his knowledge of indigenous cases in Canada and the United States to make comparisons with relevant Australian examples, thereby qualifying some of our assumptions about the incompatibility of disciplines like history and the law. He explains how the Canadian courts, and academic disciplines such as anthropology and history, have not only found ways to work together but have also mutually influenced each other through the process. The Canadian courts have also formally integrated the presenting of indigenous evidence into their structures. Covering the lengthy time span between 1946 and 2002, Ray demonstrates how title claims in United States, Australian and Canadian litigation have raised challenging questions relating to hearsay, voice, research, and evidence, especially regarding the practices of anthropology and history. In the Canadian case, he contends that the courts do not have a problem recognizing the relevance of history and working closely with historians in the courts. Only historical understanding, for example, can explain how ‘tradition’ might be measured for the Meti people, whose communities grew out of nineteenth century unions between the French and English fur traders and indigenous women. Ray also discusses ways that Indigenous perspectives have been incorporated in Canadian court hearings. By providing concrete examples of change being effected within the courts, Ray challenges the sceptics who might assert that the legal system is immobile and intransigent. More surprisingly to an Australian audience, the Canadian courts have welcomed opportunities to evaluate in detail the different approaches of various branches or practices of history.

By contrast, in Section Three legal scholar Arthur Glass is particularly sceptical of the capacities of history to resolve legal disputes: ‘There are some things that law rightly treats as irrelevant’, he argues. History, he implies, might appear too general for law, because the latter must focus on the specific. Nevertheless, he concedes that historians can sometimes assert influence by ‘assembling primary factual material’ or explaining why the past should be understood in a particular way. However, historians would do well to agree to have their ideas evaluated by a non-historian. Arguing that the Yorta Yorta judgment will have a profound effect upon the type of historical evidence relevant to native title claims, he considers the High Court rulings that tackled concepts of tradition, change and continuity without necessarily being informed by the larger relevant intellectual context or literature. He exhorts that when historians have persuasive arguments, they should try to change judicial thinking by presenting them in socially influential contexts outside the courtroom.

Legal scholar Anthony Connolly also gently rebukes exponents of the humanities for their naivete and misunderstanding of the courts. He suggests that humanists do not properly understand their expert function in the courts, particularly when they use their time as expert witnesses to lobby for change in how the law treats them. In order to refashion the legal process, humanists must learn to argue persuasively for their own legitimacy. In the public sphere and a range of venues outside the courts, humanists need to provide convincing arguments about how and why they can be useful. He emphasises that the legal system is grounded upon general rules designed to apply to ‘objectively determinable factual situations’. Disputes are thus over the facts of the matter. The trial serves as a space of authoritative if not socially useful storytelling but it is essential to the court process that the testimony and evidence of the witness be carefully regulated. He concludes overall that the scientific disciplines are simply better matched to the court’s purposes and practices.

Taking an opposing perspective, Justice K. J. Crispin argues that we cannot assume clear-cut distinctions between the veracity of the
While neither science nor law can claim to have eradicated human fallibility, Crispin demonstrates how evidence is always reliant upon interpretation. Drawing upon a wide range of cases, he concedes that cross-examination techniques are often not a helpful method of presenting complex data. Advances within any discipline — for example the forensic advances since the Lindy Chamberlain case — can overturn previous expert opinion. Summarising the problems that expert witnesses can hold for juries and judges, he notes that little study has been conducted on how juries might respond or how juries work more generally. While neither science nor law can claim to have eradicated human fallibility, as Hal Wooten, Mark Finnane and others have demonstrated, error can lead to grave injustice and heavy consequences. Consequently Crispin concludes that the system and individuals within it should be vigilant in the quest for humanity, humanist values and aspirations to reach the truth.

John Sutton, a philosopher of psychology and history of science, poses searching questions concerning memory and truth, thus questioning the legal reliance on firsthand testimony as opposed to expert testimony. Drawing upon developmental and cognitive psychology, Sutton examines some causes of error and distortion within memory processes and considers the contestability and lack of uniformity in memory. Although not altogether dismissing the value or reliability of a witness’s memory, Sutton argues that new insights from psychology certainly challenge the common sense assumptions of ‘automatic epistemological privileges for memory’. He reminds us that the authority of memory is socially and legally contextualised, and always either boosted or compromised by its fit with other relevant beliefs.

Law Professor Larissa Behrendt examines from an Indigenous perspective the deep-seated coloniser narratives that shape the thinking of Australian courts, especially the mythologised case of Eliza Fraser. Captivity narratives, where white women must be saved from ‘degradation’ or ‘a fate worse than death’ at the hands of black male ‘savages’, were widely circulated and eagerly read by colonizers throughout North America and Australia. Behrendt argues that, left unquestioned, such narratives of nation continue to sustain warped understandings and bias towards cases involving the sexual assault of black women. Colonising narratives thus subtly and relentlessly inform contemporary judgements concerning Indigenous individuals and their culture. Here we see how the subjective underlying processes of historical formation can eventually become legal bedrock.

Historian of law and institutions Mark Finnane explores enquiries into truth, offering insights into the history of the management of truth and its consequences. Focusing upon the cases of people who live administered lives, such as those in mental hospitals or prisons, he raises challenging problems about the relations between public and private, openness and secrecy, privacy, disclosure and confidentiality. First referring to the notorious case of Rupert Max Stuart, Finnane provides a detailed examination of the complex influences of racism and institutionalisation on Vincent Roy Ryan, who died in custody and whose case was investigated by the Royal Commission into Aboriginal Deaths in Custody. Humanists, Finnane concludes, do not merely gather facts but can apply ‘research questions and methodologies that throw light into dark places’. Suggesting a dual role for humanists as both advocates and scholars, Finnane argues that unless an individual or group happens to have dedicated advocates to their cause, and unless societal structures allow truth to become contestable, the inhabitants of closed institutions do not in fact benefit from privacy controls, but become its victims. The humanist scholar can enable us to distinguish past and present institutional and cultural contexts as well as the ends we seek in proclaiming truth.

Proof & Truth: the Humanist as Expert aspires to reach practitioners of law, scholars of law, humanities scholars, scientists and those who believe in humanism, or the potential for improvement of human societies. In this way we may help to shift the terms of the debate and to begin to provide some convincing critiques and rationales for ensuring a more constructive, informed and informative role for humanists in the courts.

Unlike Petty’s rather fragile and easily modified law machine, the common view is that legal institutions are (or should be) immobile and unchanging. But these cornerstones of our social and political order emanate from human endeavour and reflect a humanist aspiration to justice. They can thus never be immobile. Although the cogs of justice may turn slowly, we believe the courtroom and its practices will always be malleable to constructive humanist input as long as we are prepared to crank the handles. Finally, we
hope that this collection will lay a foundation for future exchanges and more substantial collaborations in our respective quests for proof and truth.

Notes
1 Bruce Petty's Law Machine is in the collection of the National Museum of Australia.
3 See two 'precursor' papers by Ann McGrath, pp. 229-264.