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The Past and Foreign Countries

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THE PAST AND FOREIGN COUNTRIES

JEREMY WEBBER*

In his 1953 novel *The Go-Between*, LP Hartley coined an aphorism that has proven a tremendous gift to all historians: ‘The past is a foreign country: they do things differently there.’¹ His observation is especially appropriate for this exciting initiative, the Centre for Comparative Law, History and Governance at Macquarie University – a centre that is committed to examining law across both time and space.

Hartley’s phrase reminds us of the need, in writing history, to consider the past in its own terms – to realise that concepts familiar to us may have had a profoundly different colouration in that other time. If we are going to understand what happened then we have to suspend our preconceptions, put ourselves in the shoes of those people, and try to grasp the concepts as they would have grasped them. Good history requires immersion in that other time. It requires that we be willing to subject our own presuppositions to testing and revision. Not incidentally, that willingness is also essential to good comparative work. Hartley’s reminder summarises the discipline that makes historical and comparative work so valuable. That work forces us to probe our beliefs, compare them to the features we encounter elsewhere, and expose our assumptions to scrutiny and evaluation. Historical and comparative work tells us much about the other time and place, but it also tells us much about our own.

Now, lawyers who are engaged in writing history are in special need of that discipline. We are so used to employing the past instrumentally – combining references to several cases, often from several centuries, to support whatever argument we want to make today – that we can do very bad history, ignoring context, treating words as though their use in 1905 were the same as their use today,

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L P Hartley, *The Go-Between* (1953).

and failing to distinguish how the decisions of the past were often made in profoundly different institutional contexts and with different questions in mind. We have to shake ourselves free from the urge to draw quick, simplistic lessons if we are to give the past its due and uncover its real lessons – for of course, the past does have things to teach us.

Now, my concern in this lecture is not with the simple need to understand the past in its own terms, important as that is. I want to focus on another kind of strangeness – one that lurks behind Hartley’s aphorism when applied to law, one that bedevils historical and comparative scholarship, indeed one that often distorts the interpretation of the law itself. It is a problem that lawyers in practice and lawyers in the academy share, and that often trips up our interactions. It is the strangeness that exists between the reasoning of lawyers when interpreting the law, arguing cases, and making decisions – what is sometimes called the *internal* point of view, for it focuses on how arguments are fashioned and deployed within legal practice – and historical and sociological accounts of the very same body of law – what are sometimes called *external* approaches to law.

The strangeness is puzzling, for both internal and external approaches address precisely the same phenomena. Both are compelling. It is not at all uncommon to find lawyers relying upon both kinds of explanation, in different contexts, to understand the very same developments. And yet the two types of explanation are profoundly different, even incompatible. How can they co-exist as accounts of the same world?

I think they can co-exist – or at least, I think there are ways of clarifying why they are different and yet both have something real to say. It is crucial that we do clarify their relationship if we want to write good legal history, if we want to understand the lessons that history can teach us – indeed if we want to understand law. This lecture is about that need for clarity.

I *SHEA V CHOAT*

Let me begin with an example. I came across this story in the early 1990s when I was writing on the history of labour law in nineteenth-century Ontario – or, as Ontario was known for most of that period, ‘Upper Canada’.² I am certain that a similar story could be told about nineteenth-century Australia. Indeed, I will cite a very significant Australian parallel shortly.

In nineteenth-century Upper Canada the law of master and servant was emphatically local law, administered by lay magistrates. Their chief remedies were, for an absconding servant, imprisonment until he or she agreed to work again; or, for a master who refused to pay the wages that were due, a civil judgement in the

² Jeremy Webber, ‘Labour and the Law’ in Paul Craven (ed), *Labouring Lives: Work and Workers in 19th Century Ontario* (1995) 105.

servant's favour. The magistrates' jurisdiction and the very remedies they administered were founded on a long chain of English statutes stretching back to the Statute of Labourers of 1349³ – although the most important of these statutes was the Statute of Artificers of 1562⁴ – or the 'Statute of Elizabeth' as it was commonly known.

Now of course, the magistrates – who were not legally trained – had no direct knowledge of these late medieval and renaissance English statutes. They drew their law from the ubiquitous magistrates' manuals – compendia that summarised the law generally applied by magistrates. Until 1835 the manual of choice was Burn's *Justice of the Peace* – an English work also relied upon in Australia.⁵ After that date an Upper Canadian manual was available, WC Keele's *Provincial Justice*.⁶ These manuals summarised the provisions of the labour statutes, set out the jurisdiction and powers of the magistrates and described the applicable law.

But as one might imagine, not all the provisions of an Elizabethan statute made sense in the developing farms and towns of Upper Canada. The requirement that apprenticeships be for a period of seven years was especially jarring and never followed – although it was duly repeated in edition after edition of the magistrates' manuals. In the very rare cases that came before the province's superior courts, judges, noting provisions like the 7-year apprenticeship, began to express doubts about whether the English labour statutes had ever been received in Upper Canada.⁷ Finally, in 1846 in the case of *Shea v Choat*,⁸ the Court of Queen's Bench ruled that the Statute of Elizabeth was not and never had been part of the law of the Province.

But that raises the puzzle that is the focus of this lecture.

We say that *Shea v Choat* decided that the labour statutes had never been received in Upper Canada – that they were never part of the law of the Province. But in what sense is that true? By that time, half a century had elapsed during which that law had been applied day-in and day-out, by hundreds of magistrates, whose very authority to deal with labour matters rested on the statutes. Surely, in a very real sense, the statutes *had* been in force in Upper Canada. They had furnished virtually the entire legal apparatus applied to workers for more than 50 years. It would come as a surprise to some poor labourer, imprisoned in the local lock-up in 1832 for having left his employment, to be told that the labour statutes had never been part of the law of the province.

³ 23 Edw. 3 (1349).

⁴ An Act touching divers Orders for Artificers, Labourers, Servants of Husbandry and Apprentices, 5 Eliz. (1562) c. 4.

⁵ Richard Burn, *The Justice of the Peace, and Parish Officer*, in multiple editions beginning 1754.

⁶ W C Keele, *The Provincial Justice* (Toronto: UC Gazette Office or H Rowsell, in five editions beginning 1835).

⁷ *Fish v Doyle* (1831), Draper 328; *Dillingham v Wilson* (1841) 6 UCQB (OS) 85.

⁸ (1846) 2 UCQB 211.

And the problem is not simply one of timing. It wouldn't be accurate to conclude that prior to 1846 the labour statutes were in force; after, they were not. For of course the two senses in which we speak of the law being 'in force' were both in play prior to *Shea v Choat*. Before that case lawyers could – and some did – claim that the labour statutes 'were never part of the law of this province.'⁹ We lawyers know what they meant. Moreover, in a way, they were right. Certainly their position was vindicated by *Shea v Choat*.

Nor can we erase the difficulty by drawing an easy contrast between 'law in books' and 'law in action'.¹⁰ For of course, people on both sides in the controversy thought they were applying the law as it was determined by the authorities (the law in books), and both were engaged in the practical business of arguing and deciding cases (the law in action).

Nor did the magistrates simply get the law wrong, for of course before the decision in *Shea v Choat* the question of whether the labour statutes had been received was, in a very real sense, open. It could be, and was, argued both ways. It would be a peculiar kind of victor's justice to conclude that the magistrates had simply been mistaken all along, simply because *Shea v Choat* had been decided against them.

So we have two senses of 'the law' co-existing in this example: We have law as a practical system of regulation, operating day-to-day primarily through the agency of magistrates. And on the other hand, we have a set of arguments about how the law should be interpreted – about what the law, on its best view, should be taken to say. It would be helpful if these two senses of law were independent. But of course they are not, at least not entirely. Conceptions of how the law should be interpreted clearly feed back into, clearly shape, the practical pattern of regulation – as they did in the reform of the law of master and servant that followed the decision in *Shea v Choat*. But equally interestingly, the past practice of regulation provides reasons for interpreting the law in particular ways. The fact that a panoply of labour regulation had been built upon the labour statutes was strong reason for the court in *Shea v Choat* to find that the statutes had been received – not a conclusive reason as it turns out, but a strong reason.¹¹ And that certainly accords with the common lawyer's instinct that norms that have come to be engrained in practice have a strong claim to be considered law.

So what do we mean when we say what the law of a particular time is? How do we navigate among these different uses of the term?

The problem is an important one. It is, to some degree, our continual predicament, one over which we trip more often than I think we realise. And occasionally we confront it in a big way.

⁹ Webber, above n 2, 134.

¹⁰ The celebrated phrase is Roscoe Pound's: Pound, 'Law in Books and Law in Action' (1910) 44 *American L. Rev.* 12.

¹¹ See, for example, the argument of Robert Baldwin, Webber, above n 2, 135.

This was true in Australia, for example, in the long-delayed recognition of Aboriginal title in *Mabo v Queensland (No 2)*.¹² At the time of that decision Australian land law had developed for something like two centuries without regard for an Aboriginal interest in the land. Although some colonial officials had argued early on that an Aboriginal interest did exist, and although Aboriginal hunting and gathering were acknowledged in some contexts (notably in reservations to certain pastoral leases), by the mid-twentieth century any right of Aboriginal title had been so completely ignored that it is misleading even to speak of it being 'ignored.' It was simply beyond the contemplation of the vast majority of lawyers that any such interest could exist. But then what should happen when the question is put squarely before the High Court in *Mabo*? Should the court acquiesce in the fact that, for two hundred years, there had been no Aboriginal title in Australia? Or should it find that regardless of the situation on the ground, Aboriginal title, on the best view of the law, should be held to have existed throughout that time?

This was a real question – a wrenching question. There were and are excellent reasons for accepting that Aboriginal title existed, reasons for which I have argued elsewhere.¹³ But it still reveals an odd dissonance in the way we speak about law. In *Mabo*, Dawson J resolved that dissonance by finding, among other things, that Aboriginal title could not have survived such a consistent history of neglect. Toohey J ignored the dissonance, treating the assumption that title didn't exist as though it had been one long mistake. The other majority judges specifically spoke to the problem, saying why, despite the long period during which the existence of Aboriginal title was doubted, it was still appropriate to find that Aboriginal title existed. Two important reasons were that the courts had not previously decided the issue (at least not with the clarity, authority, and extent of argument required for such an important question), and, most significantly, that the failure to recognise Aboriginal title had been founded on assumptions now considered deeply repugnant. Nevertheless, the majority made some concessions to the long period of neglect, most clearly in Brennan J's favouring of a relatively easy test for finding, in specific situations, that Aboriginal title had been extinguished, and in the majority's suggestion that compensation was not required for past instances of extinguishment.¹⁴

But all of the judges, in the majority and the minority, considered themselves to be stating, in some sense, what the law was, not simply changing the law. The conundrum remains. How are we to make sense of it?

¹² (1992), 107 ALR 1.

¹³ Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17 *Sydney Law Review* 5.

¹⁴ See Webber, *ibid.*, at 15-17 and 19-20.

II DESCRIPTIVE AND EXHORTATIVE MODES IN DISCUSSIONS OF LAW

The starting point, I think, is to realise that we talk about law in two distinct modes, although we often use precisely the same terms to express each of these modes.

On the one hand, we speak in descriptive mode, attempting to portray as precisely as we can what the law of a particular society is. When we speak in that mode – when we genuinely try to describe the legal order in effect in a particular society at a particular time – our picture of the law is inevitably complex. It comprises a structure of legal argumentation, not merely a consistent set of rules. It includes a range of possible arguments – indeed, it may be better to say a range of normative resources out of which arguments can be constructed. It includes normative disagreement, as well as means for resolving that disagreement, perhaps only provisionally and perhaps with those resolutions differing among different institutional fora.

In fact, when looked at descriptively, the law of any society is inevitably plural: plural in the sense that there remain as yet unresolved controversies among those participating in the legal order; plural also in the sense that the system as a whole is, at any given moment, imperfectly rationalised. Indeed, in descriptive mode it is often best to speak of a ‘legal culture’ rather than ‘law’ in the singular.¹⁵

Good legal history always works in the descriptive mode. It attempts to capture the range of permissible arguments, the relative weight of those arguments in the society in question, and the ways in which conclusions are determined and operationalised.

As legal practitioners, however – as solicitors, barristers, judges, even as academic lawyers – we are driven to go beyond the descriptive mode. For of course, a legal order is not just about the free expression of the full range of normative possibilities. Law involves the attempt to establish a common normative position on at least some questions so that people can live together in an ordered society. In developing that common position, law does not and cannot rely simply on agreement. Our normative disagreements are too profound for that. Rather, the law establishes procedural mechanisms – principally legislation and adjudication – for providing provisional resolutions to normative disputes. Those resolutions are partial; they exist only for the purposes of collective regulation. The underlying controversies remain, and the positions that lost out on this occasion may in the future carry the day. The collective resolutions are, then, both provisional and

¹⁵ See Jeremy Webber, ‘Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken’ (2004) 29 *Australian Journal of Legal Philosophy* 27. The internal plurality noted in the text differs, however, from what is often called ‘legal pluralism:’ the coexistence of a multiplicity of legal orders in the same social field. For the latter form of legal pluralism, together with what I mean by a legal order, see Jeremy Webber, ‘Legal Pluralism and Human Agency’ (2006) 44 *Osgoode Hall Law Journal* 167.

peremptory. But they are fundamental to the existence of an ordered society. They are the very essence of law.

Legal orders, then, have to provide some means for zeroing in on specific normative outcomes, despite the persistence of normative disagreement within the society at large. Lawyers play an essential role in that process. We attempt to weigh the various arguments in favour of a particular interpretation of society's norms and present what we take to be the best single interpretation. We assist in the process of winnowing normative controversy and determining a single, authoritative, interpretation. In doing so, we are not merely describing the law of our society. We are arguing for one specific outcome among the many that might plausibly be accepted. We are speaking in exhortative mode.

We might use terms that appear to be descriptive when doing so. An Upper Canadian lawyer might say, prior to *Shea v Choat*, 'The Statute of Elizabeth has never been in force in this province. A statute cannot be received in part and rejected in part. Many of the Statute's provisions are wholly inappropriate to this colony. Therefore the statute as a whole must be inapplicable.' But in doing so he is not saying that the law of Upper Canada, as a matter of descriptive fact, never included the Statute of Elizabeth. He is saying that on its best interpretation, the law of Upper Canada should be held not to include the Statute. He is stating and justifying a preferred interpretation of the law.

Now, in calling this the exhortative mode I don't want to suggest that we are simply asserting our personal preferences. We may well be basing our arguments on what seems to us to be the best reading of the legal materials available. We may think, then, that we are being as faithful as possible to those materials, keeping our own preferences firmly in the background. For that reason, I toyed with calling this the 'conclusatory' rather than 'exhortative' mode. But ultimately that terminology seemed too cautious. In trying to narrow down the range of possible arguments to a single consistent view of the law we are doing more than engaging in particularly refined description. We are arguing for a highly specific outcome that is not simply dictated by our raw materials. We are exhorting our colleagues to see that outcome as the best interpretation of what is inevitably a complex and open-ended set of legal considerations.

The difference between the descriptive and the exhortative modes is, I believe, inscribed in the orientation of our professions towards the law. I am sure I speak for most law teachers here when I note how one is struck, when teaching non-lawyer accountants, for example, by how differently they look at law. They are generally very reticent to formulate legal arguments and instead adopt a cautious, unimposing, outsider's view of law. And why? Because they think of law entirely in descriptive terms and attempt to determine, as a matter of empirical fact, what the law is. They fail to see that lawyers, in the process of making their arguments, necessarily have to make and remake law, narrowing it down to a particular 'best' outcome.

In fact, I think that something like the same insight helps explain the difference between solicitors' and barristers' views of law. It would be a big mistake to contend that solicitors are law-takers rather than law-makers in the same way that accountants are. Solicitors' practice has had a significant impact on the law, devising novel instruments, consolidating and applying solicitors' own views of the law, and shaping counsel's opinions in conference. But solicitors nevertheless are acutely aware of the openness of law and the need to protect their clients' interests against that range of possibilities. Barristers, on the other hand, are the purest advocates, unabashedly arguing for their preferred outcome.

III CONNECTIONS BETWEEN THE DESCRIPTIVE AND THE EXHORTATIVE MODES

As these very examples indicate, there are interesting connections between the two modes.

Generalisations are difficult for there are different schools of thought amongst those practicing both. Within the descriptive mode, people pitch their descriptions at different levels of generality, they necessarily weave various elements of explanation and causality into their accounts, they rely on different source materials, and they often differ in their evaluation of what social factors drive the law. Descriptive accounts too are interpretations. It is just that they are interpretations that seek to explain the order that exists in the world, remaining as faithful as possible to the range and diversity of practice. Because they are working with raw materials that are inherently evaluative – statutes, judgements, standards of ethical practice – they must inevitably sift claims of right, not just brute actions. But they do so in a manner that remains alert to the openness of law, to the range of acceptable answers, and to describing the kinds of factors that may produce one answer over another. They are not attempting to do the law's work of narrowing and affirming a highly specific version of the law's content as a means of establishing a single, coherent, collective norm.

People speaking in the exhortative mode are doing that work. They are specifically attempting to state what the law should be out of a welter of possible alternatives. Again, there is a large diversity of ways of doing this, some (the positivist approaches) purporting (without much success) to work purely and simply with the legal texts themselves, some drawing expressly on normative principles from outside the texts, and some drawing their norms from a wide-ranging interpretation of practice and experience. I have to say that in my view, all legal interpretation in fact blends all three approaches, and that our arguments over legal interpretation are more about the specific ways in which we draw upon and combine these sources, not about the fact that we do. It is about the weight and structure of our reasoning, and the extent of our rigour in formulating various components. What legal positivist has not invoked empirical judgements about the way the world works, general assessments of proper conduct, or considerations of 'policy,' in determining how the law should be interpreted? The difference may lie largely in the attention to

evidence with which the empirically founded judgements are made, and whether those judgements are exposed to scrutiny or simply assumed without argument. But we don't need to resolve that controversy now. What I want to emphasise is that the exhortative mode also draws upon interpretations of legal materials and social practice; it is just that it pushes those interpretations well beyond results that can reasonably be said to be established within society and proposes particular resolutions to contested readings.

Now in doing so, those engaged in the exhortative mode have resources on which to draw beyond their own personal preferences. They can reasonably argue that one position is more consistent with other areas of law, or more in tune with social practice, than competing interpretations. In the *Shea v Choat* situation, for example, an advocate could argue that a conclusion in favour of the reception of the labour statutes would provide less disruption to settled expectations within the Province; or, on the other side, an advocate could argue that a finding that the statutes had been received would create insuperable difficulties for our sense of the authority of legislation, for we would have to conclude that they had been received in some respects and not in others. Each of these positions works off of particular understandings of the legal order's method and impact. There are, then, substantial continuities between the exhortative and the descriptive modes, continuities that lead us to use language that sounds very much like description in our exhortations: we try to forcefully state a particular view of how the law works, in the hope of encouraging our listener to accept that as the most appropriate interpretation.

The descriptive language tends to blend into the exhortative aim. That can lead us to confuse the two, treating what is really contentious exhortation as though it were mere description. We can all think of advocates and judges who have fallen into this confusion, and who fail to see any merit in arguments other than their own. They tend to be the poorer for it, tone-deaf when encountering other points of view, unresponsive to new information and arguments, and inattentive to the weaknesses in their own positions.

IV IMPLICATIONS

There is good reason to keep the distinction between the descriptive and exhortative modes clear. Let me close with some indication of why it is so important.

Most obviously, it can prevent us from writing legal history that is entirely divorced from the law as it was lived and experienced. *Shea v Choat* tells us that the labour statutes were never in force in Upper Canada. We then take that at face value, neglecting half a century when, to all intents and purposes, things were otherwise.

Moreover, we want to keep our focus squarely on description if we want to understand how law operates as a concrete means of social regulation. For example, it is easy to fall into the comfortable error of thinking that the law that defines the distinctive relationship between indigenous people and the non-indigenous state is

the law of native title. That law is important, and I have spent a good part of my academic life working on it. But one should never forget that for the vast majority of Aboriginal people, their relationship to the law is much more visceral: it is found in the activities of the local police, or in what the local landholder can successfully do in the exercise of his or her property rights.

Above all, we need to have access to painstaking descriptive accounts in order to develop the law in a manner sensitive to its actual social impact. Law reform, and indeed legal argument generally, depend on judgements about how the law operates in practice. We want those judgements to be as clear-sighted as possible, so that the law's development is based on a realistic appraisal of the law's effect, not untested presuppositions. Let me give an example. In 2001, there was a boisterous debate about changes to the workers' compensation regime in NSW, which restricted common-law rights to sue on the basis that there would then be more resources available for compensation (because fewer resources would be consumed by the litigation process).¹⁶ Now, our instinct as lawyers is to resist any such limitation, not merely because it is in our financial interest to do so, but because any limitation in civil actions seems to restrict individuals from the means of obtaining a more perfect justice. But whenever I hear those arguments I think of the practice of the lawyer for the Canadian Pacific Railway in Calgary Alberta, later Prime Minister of Canada, RB Bennett. He acted for the CPR in a wide range of matters, including wrongful death claims by widows of workers killed on the railway. If the judgements went against the railway he would routinely appeal, sometimes through more than one level of appeal, even though his record of success was much lower than that of his competitors at the bar. That might suggest that he was a particularly bad judge of the strength of his arguments. Or does it? If you were advising the next impecunious widow who was contemplating a suit against the CPR, what would your advice be?¹⁷

It is crucial that in developing the law we keep in mind its effective impact, and for that, we need initiatives like this Centre. I hope that the Macquarie Centre for Comparative Law, History and Governance will situate itself squarely within the descriptive mode, revealing for us the plurality of influences on the law, the range of law's possibilities at any given moment, and the practical means by which those possibilities have been translated into functioning systems of social regulation. Or, to put it another way, I hope that this Centre will faithfully reveal that strange foreign country of the law in its various contexts – a strangeness that nevertheless has peculiar relevance for us all. In doing so, I trust that the Centre won't neglect

¹⁶ See Rachel Callinan, *The Future of the New South Wales Workers' Compensation Scheme*, Parliament of New South Wales Briefing Paper 8/2001, online: Parliament of New South Wales <<http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/7CA04CB076A7536FC A256ECF0007B947>>.

¹⁷ Louis A Knafla, 'Richard 'Bonfire' Bennett: The Legal Practice of a Prairie Corporate Lawyer, 1898 to 1913' in Carol Wilton (ed), *Essays in the History of Canadian Law – Beyond the Law: Lawyers and Business in Canada, 1830-1930* (1990) 320.

the role of lawyers' and judges' exhortation in the development of the law. Some legal history has fallen into the trap of adopting such a rigorously external perspective that it has failed to make sense of the internal argumentation of the law, while on the other hand, some of the best legal history has found ways of incorporating law's normative debates within its account, with immensely instructive results.¹⁸ One of the advantages of thinking in terms of a descriptive/exhortative dichotomy, rather than an external/internal dichotomy, is that the former can take account of the fact that both internal and external influences shape the law. It sees the difference between lawyers' reasoning and historians' reasoning as residing chiefly in the conclusatory vocation of the former.

Those associated with this Centre have long been on the right side of all these dichotomies. They have written some of the richest, most insightful accounts of the law available. I, like you, look forward to many more.

¹⁸ For a wonderful discussion of many of these issues, to which this article is greatly indebted, see Robert W Gordon, 'Introduction: J Willard Hurst and the Common Law Tradition in American Legal Historiography' (1975-76) 10 *Law and Society Review* 9.

