# No 36 (Spring 2018)

**The newsletter of the Francis Forbes Society for Australian Legal History**

**History reports itself**

This is what it’s come to, is the theme of the last few weeks’ media coverage of Judge Kavanaugh’s nomination. For better or for worse, if by “it” we mean personal invective and public outrage travelling in tandem, we’ve seen it all before. President Trump is well-known for his identification with President Jackson, the man who rode to office to clean out an Augean Washington. Jackson’s own political career in a male-run world travelled alongside imputations about women, regular attacks on his own wife as well as the Petticoat Affair. Nor were the sex and politics of two centuries ago confined to the west Atlantic. Queen Caroline was doing her bit – or forced by her appalling husband to do her bit – for gender politics in England. For the legal historian, though, Jackson is best remembered for his remark upon Worcester v Georgia, an American Mabo, “John Marshall has made his decision; now let him enforce it.”

**David Ash, editor**

**The Society’s 2018 Plunkett Lecture**

# **The Attorney General of New South Wales, the Hon Mark Speakman SC MP, will deliver the 2018 Plunkett Lecture on Monday, 29 October 2018 at 5.15 pm in the NSW Bar Association Common Room,** Martin Place or St James is the nearest rail stop.

**Current NSW Supreme Court tutorials**

The series continues to benefit all of those interested in how the good and the bad of the rule of English law took hold in Australia. The remaining lecture for this year is that by the Chief Justice, the Hon T F Bathurst AC, The History of the Law of Commercial Arbitration, on Thursday 18 October 2018.

This tutorial will be held at 5.15pm in Banco Court, the Law Courts Building, Queen’s Square, Sydney. Martin Place or St James is the nearest rail stop.

# **The Society’s 2018 Essay Competition**

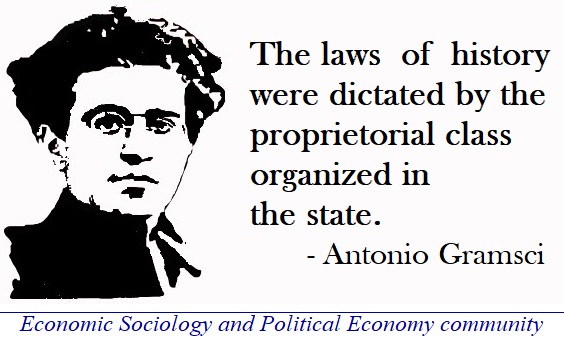
# Details of the 2018 Essay Competition are available on the following link: [2018 Essay Conditions and Guidelines](http://www.forbessociety.org.au/wordpress/wp-content/uploads/2016/02/2018-Essay-Conditions-and-Guidelines1.pdf).

**Eugene Schofield-Georgeson, By what authority? – Criminal law in colonial New South Wales 1788-1861, 2018, Australian Scholarly, 218pp**

**[scholarly.info/book/by-what-authority-criminal-law-in-colonial-new-south-wales-1788-1861]**

Aristotle tended to favour form over substance, so he wouldn’t have made much of a jurist in the classical liberal mould. If law is the administration of justice, then the substance is in the justice and the form in the administration.

Criminal law and procedure is an archetype in this dichotomy, and this short and necessary history is antidotal to the archetype. It is expressly upon Antonio Gramsci (who knew a thing or two about prison life) and the Italian martyr’s ideas of cultural hegemony.

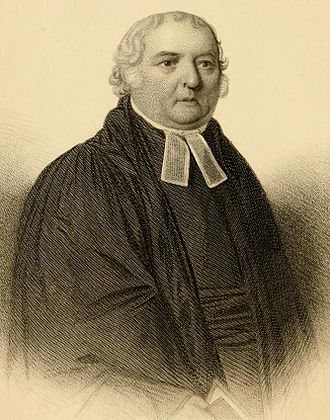


The author’s premise is that criminal law and procedure may be a falsehood, and that the process which is the criminal law should be viewed in an holistic fashion. The work is primarily a bottom-up view, people whose poverty or race or gender put them at the base of the social pile. I liked the author’s generic description in his introduction, “those with limited social resources”. On the one hand it’s an anaemic and bureaucratic euphemism, on the other a few short words which really sum up Gramsci’s paradox: is society a product of social resource provision or its vehicle?

The work is primarily, but certainly not wholly, a bottom-up view. The date range of the title indicates the development in the period:

*By 1861… a majority of the colony’s voters had elected politicians who assisted the passage of legislation to improve or humanise criminal process by securing fair trial rights – a democratic advancement that depended on reforming the magistracy and significantly limiting the severity of punishment.*

At the top end of things, the author gives ample space to identify reformers, usually lawyers, and reactionaries. On the other side are the magistrates, in large part either landowners or their lackeys. It is telling that “judge” and “jurist” with their flavour of decision-making have worked their way to the top of the classical liberal pile, while “magistrate” with its flavour of power has not. Moreover, the ownership of land in NSW of all places gave piquant support to Proudhon’s axiom that property is theft, placing magistrates in a peculiar part of the criminal process.



The author records Samuel (the flogging parson) Marsden as reporting

“the people will absent themselves as soon as they know I’m coming.”

The year 1861 was also significant for a background to Gramsci’s thinking: the death of Cavour, the commencement of the kingdom of Italy, and by it the beginning end for the Papal States. This work does not deal in any depth with what this reviewer thinks was a key NSW group “with limited social resources”, Roman Catholics.

For many unionists, invariably Protestants, Roman Catholics were at best disloyal, apologists for terrorists right up until the mantle was assumed by Muslims in the late 20th century. Yes, there were a number of exceptions, and the author gives good space to Roger Therry, the exemplar Catholic whig of the period. But a fuller story, a story of Catholic separateness over two almost two centuries ending with the absorption of its conservatism by Australian conservative parties and the emergence of a strong Catholic presence not alongside but as a significant part of the legislative, executive and judicial elements of Australia’s structural hegemony is one of the extraordinary and most unmarked apotheoses of our political history. Perhaps the author is Marxist in this; it is one thing to observe that religion is the opiate of the masses, but a better thing to mature and to realise that this is merely part of the wider questions of power.

Instead of placating this reviewer’s need for religious diversity, the author gives focus to names, some well-known, some unremembered. Many interested in Australian history – and those fashionable enough to brunch at Hall Street, Bondi Beach – will recall Edward Smith “Monitor” Hall. Many interested in the ability of reformers to both castigate and to embrace Catholics when required, will recall John Dunmore Lang. The author notes both these glorious gaolbirds. But true to the bottom-up proposition, the author gives far more space to the tragic Edwin Augustus Withers, characterising him as a toiler for fair trials whose toil led his family into poverty and led him to the Tarban River Lunatic Asylum.



The asylum is near Bedlam Point on the Parramatta River, to the west of Tarban River.

The image is from a youtube clip [Haunted Halloween : Gladesville Asylum](https://www.youtube.com/watch?v=X4OtBcDySN8)

Withers’ life’s work is for the author to set out and he does so with gusto. I also like the assessment of his bete noir Gilbert Elliott PM by the *Bell’s Life in Sydney and Sporting Reviewer*. When dealing with Elliott’s suitability to replace Charles Windeyer as Senior Police Magistrate, it said in its 12 February 1848 issue under the heading “On their own merits, modest men are dumb”:

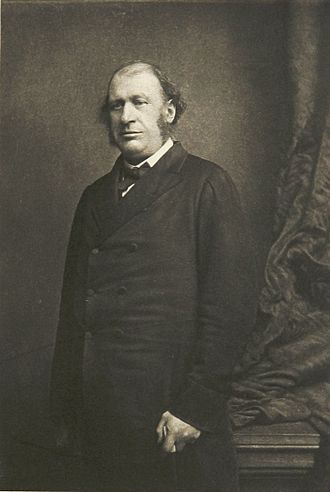
*The unenviable notoriety obtained in the district in which he has been acting for several -years, is proof positive that" the public have no confidence in-him. If we wanted a man who would hunt down the citizens by the most stringent administration of the penal laws, if we wanted a man who would support the Police in all matters in which they came into collision with the citizens; who would support the Police in a system of ESPIONAGE, in fining publicans and other " sinners": if we wanted a man who would not temper "justice with mercy”; if we wanted a man of violent temper, in fact, if we wanted a Police Magistrate directly the reverse of the venerable man who now retires from the presidential chair of the Sydney Bench, after 20 years of faithful service, crowned with honor and respect, we would advise the appointment of the prosecutor of Edwin Augustus Withers to the vacant office. There is one victim at Tarban, and we think some of the good folks of Sydney would soon be.*

I only add that I am either more or less qualified to write this review by the machinations of my great grandfather Duncan Forbes Mackay. He was sent to Tarban in 1846 and again in 1852, and may well have known Withers. Unlike the reformer, he died on the outside.

One of the powerful features of this work is its analysis of technicality as a tool:

*For Whig legal historians such as Sir James Fitzjames Stephen, these rules created an ‘irrational system’, which meant that ‘the law relating to indictments was much as if some small proportion of prisoners convicted had been allowed to toss up for their liberty’. Indeed they had. Fifty years earlier, many reformers used technicality to humanise a barbaric procedural system in which ‘too much truth meant too much death’. As Withers realised in the 1840s, technicality was the only fair and strategic legal response to arbitrary imprisonment.*

Stephen was first cousin once removed of Sir Alfred Stephen, the chief justice of NSW who presided over some of the litigation involving Withers. I am not sure I would have described the legal historian as a Whig. Yes, his grandfather was the leading lawyer for the abolition of slavery and his step-grandmother Wilberforce’s sister. Yes, his father was the key bureaucrat involved in enforcing the Slavery Abolition Act. Yes, he was a failed Liberal candidate. But he is most remembered for *Liberty, Equality, Fraternity*, a protest against Mill’s *On Liberty* and something of a neo-con bible. That said, words change their meaning and Stephen, as distinct from later commentators, probably saw himself as an older style Liberal, embracing an ordered liberty and an equality before the law. With a nod to Gramsci on balance I accept the author’s use of “whig”.



One of the Stephen clan, a most whiggish conservative

The author ennobles Sir Edward Coke. He was never Lord Coke: it may be recalled that King James with Francis Bacon got Coke off Common Pleas and onto the King’s Bench to do less mischief, where he only did a lot more. Given the source of the error, though, all is forgiven. Indeed the 1911 *Encyclopaedia Britannica* is the source of much Wikipedia knowledge. The entry for Coke is correct, an entry for Sir Edward Coke. It is in the entry for Lord Esher things go awry:

*He retired from the bench at the close of 1897, and a viscounty was conferred upon him on his retirement, a dignity never given to any judge, lord chancellors excepted, “for mere legal conduct since the time of Lord Coke.”*

But who actually made the error? Who actually said the words in the inverted commas? I’m afraid to report it was Lord Esher himself. He said at his retirement sitting:

*I have been fortunate enough to retire, as I say, with a mark, an unusual mark, given to me – a mark which I think has never been given to any judge for mere legal conduct since the time of Lord Coke.*

Almost certainly Lindley LJ would have been at the sitting, as he succeeded Esher as Master of the Rolls. He may have hinted to his predecessor, he being a direct descendant of Coke on his mother’s side.

Lord Salisbury was the greatest of all Conservative thinkers and doers, held by no less a political opposite than Clement Atlee as the best prime minister qua prime minister the latter knew from his first interest in politics. He had little time for academics, believing “A gram of experience is worth a ton of theory.” As to being lectured on morality:

*In the real business of life no one troubles himself much about 'moral titles'. No one would dream of surrendering any practical security, for the advantages of which he is actually in possession, in deference of the*a priori*jurisprudence of a whole Academy of philosophers.*

The classical liberal legal historian usually writes to a balance of categorisation and narrative. Mr Schofield-Georgeson holds to categories and does not abandon narrative. Ultimately, though, his work is one of informed polemic. He writes not of a dead past but of a living past being unwound. His cause is that of the democratic reform to criminal process which he sees as in a state of reverse. The real business of life for a man such as Salisbury was hegemony. Gramsci reminds us that the real business of so many lives is lived in gutters and he reminds us from the prison cell and not the academy. Mr Schofield-Georgeson hails from the academy but his work carries an immediacy and passion which reminds us that reality, business and life itself all depend upon one’s place in each of those things and what we each seek to do about it. His work is worth our time.

**Membership for the 2018-2019 year**

If you have not done so, the Society urges you to consider membership for the current year. For a form, click [here](http://www.forbessociety.org.au/wordpress/wp-content/uploads/2013/11/FFS-Membership-application-renewal-18-19.pdf).

**Annual General Meeting of the Society**

**This year’s AGM is to be held on Wednesday 14 November 2018 at 5:15pm in the NSW Bar Association Common Room, Selborne Chambers, B/174 Phillip Street, Sydney, NSW, 2000.**

# **À la guerre comme à la guerre**

The abovementioned Selborne Chambers, the home of the NSW Bar Association, is named for Lord Selborne the great equity lawyer and lord chancellor. His son, a successful politician and administrator, was a First Lord of the Admiralty under the abovementioned Lord Salisbury, his father-in-law. The following appeared in *The Spectator* a short time after the outbreak of the Great War.

# *The appeal by Lord Selborne in Tuesday's Times for a judicial investigation into the alleged atrocities committed by the Germans in Belgium and France deserves the close attention of all right- thinking men and women. Lord Selborne quotes two horrible stories of the maltreatment of women, given in a letter written to the son of a London vicar by an officer serving with the British Army in France. He then very properly asks whether such statements as these can be allowed to rest on anonymous authority. The statements are untrue, or they are true. If they are untrue, it is wrong to make them. "If they are true, then God and man will judge." Would it not be possible, Lord Selborne goes on, for trained lawyers or Judges belonging to a neutral Government like that of the Netherlands or the United States to conduct a sworn inquiry into such cases as are already open to investigation ? We agree. It is a burden on the national conscience that these atrocities should be spoken of, and not to know whether we may not be unwittingly accusing the Germans of actions of which they are entirely guiltless, and thus allowing the minds of our people to be unfairly inflamed against men whom we desire to treat as entitled to our respect, even while they are enemies. We are certain that our own officers and men are waging war against the Germans like gentlemen. We also want to be assured that we at home who are watching the war are supporting our men like gentlemen. But it is not the part of gentlemen to believe or to give publicity to untrue stories supported by mere hearsay. Nothing is more humiliating than the thought that we may be believing false charges against men merely because we happen to be at enmity with them. It is a temptation which every decent man resists and resents. On the other hand, if the stories, or even a part of them, are true—such, for instance, as the giving up of Louvain and other towns to military execution, and the alleged shooting of civilians, not for what they have done, but for things done by other people, things of which very likely they thoroughly disapproved and would have stopped if they possibly could—then, indeed, there is need for action.*

Nothing is more humiliating than the thought that we may be believing false charges against men merely because we happen to be at enmity with them.

*It would be not merely a national misfortune, but a crime against humanity, if these things, though proved true, were lightly to be dismissed with a shrug of the shoulders and a quotation of the familiar tag: "À la guerre comme à la guerre!" Our soldiers and the French soldiers have shown that it is not necessary that atrocities should happen in war, and that you can wage war without letting bell loose upon the civil population which is unhappy enough to be involved in it. It is possible to have a war conducted with chivalry and humanity and decent feeling—in fact, a war of gentlemen. We must see to it that, if the charges with which we are dealing are true, the rest of this war, and all wars in the future, shall be conducted on the lines of humanity and not of barbarism. It is needless to say that by this we do not mean to convey any veiled threat of wholesale vengeance. We shall not do any good to the people who have suffered so deeply in Belgium and France by making unfortunate and innocent Germans and Austrians suffer equal miseries. Such action would not be justice, but crime and folly. To know the facts, however, is an essential matter. It is necessary for the final reckoning. When peace comes, and when we deal with the ruling military castes in Germany and Austria, the way in which they have conducted the war must be a factor in the settlement. If the stories now believed about them are not substantiated, they must be relieved of the burden of suspicion. Therefore it should be the desire of all people who want to see war conducted with the minimum and not the maximum of inhumanity to arrive at a just understanding of the facts. Remember that, whatever the sentimentalists may say just now, this is not going to be the last war. There will be plenty more wars in the future, though we may hope not in the immediate future. But though we cannot stop war by inquiries and high sentiment, we believe that if we take action at the right moment we can make it certain that this shall be the last war waged as apparently the Germans are waging it – ie, on the principle that, since war is the negation of human rights, you cannot make it too brutal. That principle has often been set forth by German philosophers, but we trust it may be proved that in the field they have had no followers of their evil sophisms. We sincerely hope that it may be possible to secure an investigating body which shall not be open to the suspicion of partiality. We agree with Burke when he said that the one thing that frightened him was being judge in his own cause. Englishmen and Frenchmen at this moment may very well feel that they might be open to the charge of being judges in their own cause in such an inquiry as Lord Selborne has suggested. Undoubtedly American jurists would command most general confidence here. We cannot, of course, ask President Wilson and the American Government to appoint such a Committee of Inquiry. They would naturally be afraid of annoying the German Government by so doing, and of imperilling that strict, nay, anxious, neutrality which they desire to maintain. We do not see, however, why the French, British, and Belgian Governments should not privately invite three American jurists of high distinction to undertake the work of discovering whether the Germans have respected and are respecting the agreements made at the Hague in 1899 and 1907, and also those rules of civilized warfare which are generally respected by belligerents, and to report whether any infringements of the Convention and of those rules have been made by military order, or whether such cases of inhumanity as have taken place were due merely to the soldiery having got out of hand, and that the responsible officers did their best, even if ineffectively, to check unauthorized action. President Wilson could hardly forbid Americans to conduct such an inquiry. We note that Lord Selborne suggests that Dutch jurists should be joined with the Americans. We have the greatest respect for the Dutch lawyers, and recognize that Holland's claim to be the mother of international law would rightly give them the place of honour in such an inquiry. We hesitate, how- ever, to endorse Lord Selborne's suggestion here, for we must not forget the appalling peril in which the Dutch people stand today. They are in the grip of Germany, and they might well feel that if, as may easily happen, reverses come to the Allies, and for a time the Germans are again triumphant, the taking part in such an investigation as we have suggested might give cause to Germany to attack them, and that they might thus bring upon themselves the fate that has overtaken Belgium. In a word, we do not think it would be fair, at present at any rate, to ask Dutch jurists by their action to expose their country to risks so terrible. American Judges, happily, need not be weighed down by such considerations.*

The poignancy is the more marked by the death of Selborne’s son on active service in 1916.



Leslie Ward (Spy), Admiralty (a caricature of Selborne), *Vanity Fair*, 3 October 1901