

MELBOURNE RARE BOOK LECTURE SEPTEMBER 12, 2019

WRITING ABOUT ENLIGHTENMENT AND CRIMINAL JUSTICE

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I thank the Melbourne Law School and Carole Hinchcliff for inviting me to deliver this 2019 Rare Book Lecture.

This lecture is a personal reflection about writing my forthcoming book, **IMAGES OF AN AUSTRALIAN ENLIGHTENMENT (Unicorn Press)**.

I'm afraid when Carole first invited me to give this year's Rare Book Lecture my response was not appropriate to the honour. My response, rather than an enthusiastic 'Yes', was more of a sputter; for immediate in my mind was the thought, 'My accountant is rather hoping it won't be a rare book!' In any case, with some reassuring words from Carole, I settled down, realised the honour, and I hope said all the things that the invitation demanded.

The book itself is about the colonial governorship in New South Wales of the Scot, Major General Lachlan Macquarie, and his second wife Elizabeth Macquarie, which covered the years 1810-1821. In particular, it is about (1) what is regarded here as their enlightened treatment of the Colony's convicts and (2) their work as a history tale for today.

SLIDE 1: LACHLAN AND ELIZABETH MACQUARIE (early 1800s) (Mitchell Library – Sydney)

In Opie's portrait of Macquarie, we see a proud man, in his early forties, who being of humble birth had come far, yet in whose soul was a burning ambition to go much further. This notwithstanding, in his expression do we not see a softness, one emanating from his deeply entrenched humanitarian instincts? As to Mrs Macquarie, just thirty, surely sweet, retiring, every bit the young daughter of a comfortable gentleman; and in Macquarie's reckoning, most suited to be the wife of an officer.

(To these images we will return.)

As I have intimated, this talk is about writing this book, and deals with this couple and their work no more than is necessary to illustrate this theme.

SOME EARLY INFLUENCES ON WRITING THE BOOK

How did the book come about? For many years now, the public's prevailing beliefs and sentiments in regard to crime and criminals – the common man and woman's common sense about these matters – has troubled me, specifically, the factual basis of these beliefs and what these beliefs say about us as a civilized society. You know them well: the criminal as all bad; the belief in ever harsher punishments as necessary for effective deterrence; offenders – well, all but the less serious among them – as deserving the severest punishments to properly mark the true seriousness of their crimes; the courts as soft punishers; all four views held with no regard to the potential effects on these offenders' rehabilitation prospects, or on their humanity, or indeed what these attitudes reveal about a society where these sentiments prevail. But how to engage the public, to challenge these views?

Not an academic work, I readily concluded; there are plenty of these, and the rare public presentations of their message quickly evaporate in the ether; they appear to always fail to bite.

Independently of this, in fact long preceding it, I had read Robert Hughes' magnificent book, The Fatal Shore, in which he paints a vivid picture of the treatment of the convicts as representing the heights of degradation and barbarism. But did this view not leave much untold? For if it represented the complete picture, even the majority picture, surely, the Colony would have remained a punitive mire. But it did not. Along with this, importantly, it was the punished convicts, comprising the overwhelming majority of the Colony's population, who were the early engine room and first drivers of what was the beginning of a new nation. Something more, much more, had to be going on – surely?

So, I turned to Manning Clark's History of Australia, Vol. 1, coming to Part 4 ('The Age of Macquarie'), and thence to John Ritchie's biography Lachlan Macquarie. While my focus was not theirs, nonetheless facts relevant for me were to be found in these works, spoke for themselves. In this material I discerned a potential solution to my problem: our early history as a history tale for today. Lachlan and Elizabeth Macquarie perceiving general crime and the common criminal in an enlightened way: one understanding punishment as

reform and societal acceptance as a goal, these being pursued aggressively as an alternative to the then current regime of punishment as pain and rejection as a fate; one regarding the common convict as a person of potential worth, not as moral reject. Though the relevant facts were not presented from this perspective, they were there to be interpreted thus. (I add parenthetically, Elizabeth is absent in Clark's history, and not treated as a person of consequence in Ritchie's.)

Yet, to serve my purpose, the book could not be an academic history: one heavily footnoted; one in which people often appear lost among events; thus, people not as objects, absent thoughts, feelings, ambitions, self-preoccupation, broad lives.

Rather, I thought, the book needed to be history as story. One potentially engaging Everyman; one allowing the reader to participate in the characters' lives; one allowing the reader to get to know the story's heroes, to understand them, to celebrate and sorrow with them, to root for them, perhaps to want to join them in their cause. It should lend itself readily to film, though not fall to the level of a 'soapie'.

With respect to this, there was a second Clarkian influence. Spirits – heavenly, uplifting angels along with hellish, destructive demons – driving his historical figures. Moreover, in his closing panegyric to Macquarie he teases us thus: neither those 'who eulogized his work or execrated his memory' detected 'what came up from inside the man to lead him on to his destruction'. Thus, the challenge: to discover these spirits and bring them to life in the characters of this Macquarie history.

As a story, on objective events, it must fit the facts. In the realm of matters of subjective import, it may go beyond the facts, but must be consistent with what is known about the characters. On incidental personal thoughts and dealings, imagination may have a freer hand in the interests of engaging the reader and bringing the story to life. As an example, consider the following linked extracts from an imagined scene in the book, one beyond but consistent with the facts.

It is evening. Lachlan has dined well, is feeling good about himself, and is in an expansive mood.

Lachlan observes grandly to Elizabeth: 'When I have completed my work the Colonial Office will appreciate what I have done. Even the King will be pleased with the new jewel added to

his Crown. When we go back to England, I will be feted, and honours will be heaped upon me. And you will be so proud of me!'

We have a sufficient inkling of Elizabeth's character to appreciate that she, sober and of serious disposition, would be taken aback by this, fearing she was perhaps about to be forgotten. She must say something [...]

'I do love and honour you', she follows on [her tone now earnest], 'but your work will be my work too. I have my own ideas about how you should proceed, and I shall continue to give thought to the task in hand. Indeed, I will impress the merits of my ideas upon you. When you resist, and I think you are mistaken, I will stand up to you, even chide you. This soldier's wife intends to give her soldier-husband orders!

Your vision as Governor will be, in fact, a shared vision. I, too, see your governorship as an opportunity to do good and bring about change, to bequeath a fulfilling future to people now living blighted lives as a banished people – a change which has not been envisioned by the British authorities.'

Elizabeth quickly adds, touching him gently as she speaks: 'So, there we have the terms of our endearment for what lies ahead of us.'

Macquarie is in a good mood, and not wanting to let his equanimity be disturbed. In any case, he is accustomed to his Beloved's little outbursts. And he, being [much] older than her and most fond of her, finds them amusing. He leaves his response at a smile.

Elizabeth looks at him affectionately, and observes wistfully with a falling voice: 'I realise that the public honours will be all yours, and I will be very proud of you. But, I must say, it does seem a little unfair that I will be forgotten.'

To one of the facts licensing this imagined scene, we will return.

Yet for public engagement, the book would require something more than history as story: the story would require pictures – best, coloured pictures – and plenty of them, spread throughout the text. Thus, as I set out to collect material to inform the text, so I sought out images to illustrate the developing story. Along the way, this orientation was to change. I came to see pictures not as pictorial imagery, but pictorial text. More than the book being simply a story with images, it was in large measure to become a work of images as story. The images were to be 'read', not simply viewed. Thus, images are used in the book as a means of bringing people and events to life, of conveying something which could not be said, or said as well or succinctly or memorably or with such emotional impact, if left to narrative alone. In the end, there were to be 95 images across 80,000 plus words.

What brought this changed perspective about, I cannot be sure. Manning Clark, still alive and at work in my brain, might have played a part. Over thirty years ago now, I attended one of his public lectures. As to his topic and almost

all the content, I have no memory, save for one snippet. This was of Manning recalling how when writing about one of our early prime ministers, he could not get a handle on the man's character. His solution, to head for the prime ministerial gallery in Parliament House, and there attempt to discern in the image what his portraitist was saying about him. Inexplicably this little gem had remained in my mind, apparently waiting to be heard when the time was ripe.

Thus, it was on these two footings – history as story, and story as images – I proceeded to write the book as it was to become. It is on the second of these footings, this talk focuses.

Let it be clear, the dawning of what the Manning Clark memory meant for this present work did not come early in the research process, nor did it come suddenly. Rather, it emerged around mid-term, at first haltingly and attended with no sense of necessity, from thence growing in strength and expanding in comprehension. To these things as they appear in aspects the Macquarie story, I now turn.

THE MACQUARIES' STORY

In the Beginning.

SLIDE 2: THE ENTRANCE TO PORT JACKSON, SYDNEY (early 1810s) (after Eyre)

I came upon this antique print in a Dickensian print shop in London prior to putting pen to paper. It was one of numerous old prints in one of many stacked, dusty folders. On sight, its relevance was not obvious. What aspect of the story would it illustrate? Apparently no more than the new-comers' first sight of the Colony. So? But, if I did not take it then, once I was back in Australia, it might be beyond retrieval, since it was uncatalogued. Then, after much humming and hawing, I purchased it. Only later, as I was writing, its significance gradually dawned upon me, not once but in respect of four aspects of the story – actually. And on each occasion, it was more than illustrating, it was speaking, saying things beyond words, allowing us to enter the mental worlds of those apart of the scene or witnessing the scene at first hand.

First, this image as text acknowledges that the Macquarie enlightenment took place on the land of a dispossessed people and to their great cost. Soon after beginning to write this section, first the relevance, then the power of this image struck me. European settlement in the background, growing, ever more

rapidly encroaching on the Indigenous peoples' sacred, nurturing lands; ever more ruthlessly driving them from their traditional lands. We look back with them, now marginalized, on land which was once theirs, and try to feel their pain.

Now enter the Macquaries. This scene portrays the Macquaries' first view of their new home. Imagine their ebullience. Any tiredness from their arduous voyage would have soon been swept aside the moment their ship entered Sydney Harbour and they were confronted with its majestic splendour. For them, in their excitement, it would have represented a blank canvas upon which to paint for the British government a picture of a different society; a world which for the convicts was reforming and accepting, and which for them and their children was socially fairer.

Then there were the Macquaries' two principal enemies in the Colony. What would this scene have meant to them? One enemy was the Rev. Samuel Marsden, the chaplain. He did not come to the Colony as a pastor-shepherd, one bent on gently guiding the straying back to the fold, and unconditionally committed to providing comfort to the weak. No, he came as a chaplain-missionary. When Marsden entered Port Jackson for the first time he too would have seen a blank canvas. But the picture he painted on it was very different. Marsden's was of a Biblical New Jerusalem where once fallen souls would under his strident exhortations and harsh censures turn to the worship and service of the God of his imaging.

The other enemy was the leading thruster, one John Macarthur, who was most energetically seeking his fortune as a pastoralist. He, too, had beheld with anticipation a blank canvas upon entering Port Jackson. Soon an idea had him licking his lips: Macarthur dreamt of a society structured around, owned and led by, a landed gentry. In this world, the convicts' ambitions as free men and women would be limited to little more than comfortable colonial serfdom, in effect constrained to dedicate their lives to advancing their betters' prosperity.

Back in England, great would have been the satisfaction of the British government when they viewed this print. How well they had chosen! A remote, empty continent bereft of civilization. An image of a place of punishment, one surely to deter. An ideal dumping ground for Britain's moral refuse.

The latter three views antithetical to those of the Macquaries; three powerful enemies should the Macquaries trample on their interests.

There is a research message here: in regard to writing a book, when images are to be read and inform, as opposed to merely illustrate and decorate, one must not be content with seeking out pictures merely illustrative of current content, but browse diligently through pictorial archives prepared to find new relevance, and at the time of selection prepared to be over-inclusive.

Thus, ‘The Entrance to Port Jackson’ became more than an illustration of marginal significance; over the course of writing the book, it became a framing image for the Macquarie story. To exhibits from that story we now turn.

The Macquaries’ Treatment of the Convicts.

There were seven innovative aspects of the Macquaries’ treatment of the convicts. The following brief examples relate to two of them, namely: punitive leniency and social welfare.

First, punishment. When it came to punishment, Macquarie exercised a most parsimonious judgement. He severely curtailed floggings and hangings; and he was liberal in his issuing of tickets-of-leave, and moderated sentences of imprisonment. Witness the frustration of his Judge-Advocate, Ellis Bent, in this extract from one of his dispatches to the Colonial Secretary in London.

It is not seldom that I meet in the streets of Sydney with persons, upon whom but shortly before I have been under the necessity of passing the sentence of death, or of some other punishment intended to be exemplary.

SLIDE 3: ELLIS BENT’S DISPATCH TO BATHURST (July, 1815) (National Archives – London)

After five-and-a-half years of Macquarie, Bent had had enough!

The sources of Macquarie’s penchant for punitive leniency were manifold, involving both instinct and reason: for example, harsh punishment was distasteful to him; moreover, he regarded it as inimical to reform, and for many convicts – perhaps a clear majority – of little deterrent value. These views, we can be certain, buttressed by Mrs Macquarie’s sentiments. For in her own copy of James Boswell’s ‘Life of Samuel Johnson’, we find by way of a marked passage Johnson impressing upon her:

... but as the end of punishment is not revenge of crimes, but propagation of virtue, it was more becoming the Divine clemency to find another manner of proceeding, less destructive to man, and at least equally powerful to promote goodness. The end of punishment is to reclaim and warn.

SLIDE 4: SAMUEL JOHNSON ON PUNISHMENT

O how these words must have rung in Mrs Macquarie's ears to telling effect when she came to the far-flung penal colony. And from what we know about Mrs Macquarie, she would have ensured that they rang in her Lachlan's ears!

Does not reading Johnson's exhortation as Mrs Macquarie read it, and seeing the passage marked in her hand, add a resonance beyond words alone?

Second, welfare. There was something different about the Macquaries' approach to welfare, a quality elevating it to a different plain. Something, even today, not part of our general thinking on welfare. It is the simple idea of welfare being more than material; also, being at once social and of the spirit. Charity addresses the former, but does nothing for the latter. There is no other explanation for Mrs Macquarie's Female Orphan School, a building of simple elegance, indeed a certain grandeur. Here the girls, principally the children of convicts, would live and receive basic training.

SLIDE 5: FEMALE ORPHAN SCHOOL (Lycett, artist); MRS MACQUARIE'S FAMILY HOME (Canmore, Historic Environment – Scotland)

The School was built in an elevated position on the banks of the Parramatta River, just outside the Parramatta township itself. It was Mrs Macquarie's project from the start. She even designed the building, modelling it closely on her father's gentleman's residence – her family home – Airds House, in Scotland.

We envisage Elizabeth proudly showing Lachlan a sketch of her plans, with the following:

'Does not my family home, its style and size, and the happiness it knew, make an ideal model for my new girl's orphan school. As it sits across the river from the Government House at Parramatta, let it be a building of similar proportions, and similarly situated in parklands. Will this not loudly proclaim to the girls themselves their worth in the world; and will it not send an unmistakable message to those who would patronize them?'

Nothing better represents the Macquaries' treatment of welfare as a means of not just sustaining the body, but most importantly uplifting the spirit, than the Female Orphan School. It was the product of a particularly good and thoughtful woman, who regarded each girl as having been made in the image of God.

May I suggest, words alone would not be sufficient to capture and convey what was being done here, at least for the imaginative power of the average mind?

Yet how did the Colony's spiritual leader, Rev. Samuel Marsden, regard Mrs Macquarie's noble handiwork? Not with praise, not even unenthusiastic

acceptance; rather, to his shame, it was condemnation. Thus, did he write to the judge, John Bigge, who conducted the Commission of Inquiry into the Macquaries' Colony:

The Female Orphan Institution should not be like a Boarding School for young Ladies who have some Prospects in Life, but like a House of Industry.

We see these thoughts here, in his own hand:

SLIDE 6: MARSDEN'S LETTER TO BIGGE (re FOS) (March, 1821) (National Archives – London)

As to Lachlan Macquarie himself, the influences behind his desire to reform and elevate the convict were, as has been alluded to above, manifold. In fact, one was a driving force. It is to be identified in several letters he, an emotionally broken man, wrote to intimates after the death of his first wife.

Read these words as he wrote them to his Uncle. As you do, contemplate the emotionally discombobulated state of Macquarie's mind: the extinguishing blanket of profound sadness; the flickering fire of new zest. Does not seeing the document itself, the words as written, better allow us to digest their meaning, to feel the depth and intensity of his emotion?

Since I cannot now be happy myself in this cruel world, I wish to see others at least so. – I shall therefore endeavour to do all the good I can to my poor Relations by providing for and raising as many as possible of them from obscurity – which will afford me a very sensible pleasure to be able to do.

SLIDE 7: MACQUARIE'S LETTER TO HIS UNCLE (January, 1797) (Mitchell Library – Sydney)

Henceforth, Lachlan will dedicate his life to giving succour to the needy, to providing the deprived with the means of advancing their position and status in the world; not only 'advancing' them, but in this way protecting them from a life of poverty with its attendant risk of crime. In regard to this, note, the link between wretched poverty, consequent feelings of hopelessness, thence social and moral detachment, and in turn crime – serious crime, included – he had perceptively observed among the tenants on his Isle of Mull estate. (In this letter, Macquarie also mentions his intention to assist financially boys on Mull who are not relatives.)

Thirteen years later, and in a continent on the other side of the globe, this sentiment was to underpin a radically different course in the treatment of

society's criminals, and as part of this introduce a new era in the Colony's development.

Behind this sentiment we may discern the ever-present, enlivening – indeed, driving – spirit of Macquarie's late, most beloved first wife, Jane Jarvis.

Thus, in accord with this sentiment, Macquarie when Governor aggressively pursued a policy of small land grants, along with on-going assistance in the short-term, to selected convicts whom he had pardoned or whose terms of transportation had expired. His aim, to create an emancipist (ex-convict) yeomanry. You see, Macquarie understood, the convicts once free would need support and encouragement in order to live law-abiding lives.

So, what did John Macarthur, the Colony's prospering, would-be leader of a landed gentry have to say about this? Macquarie might have hoped this man of great wealth and matching pastoral resources would have sought the role of fellow-traveller. But no; rather, an implacable opponent of the proposal along with a malign will to bring Macquarie down.

Thus, he informed Bigge:

I feel great hesitation in offering any suggestions respecting the regulating and rewarding the Convicts for their services, because no arrangement, however wise, can, in my opinion, effect any material change for the better, whilst the practice is persevered in, of indiscriminately granting land to Convicts, and whilst the most active and vicious, are permitted to roam through the country, tempting the servants, by their ill example to neglect their Master's business, and seducing them to commit depredation upon any property within their reach.

SLIDE 8: MACARTHUR'S SUBMISSION TO BIGGE (February, 1821) (National Archives – London)

For Macarthur, the growth of a powerful convictry would be at the expense of the Colony's economic growth and prosperity; more especially, at the expense of his acquiring land, with consequent wealth. You see, Macarthur did not care that the convicts, like he himself, might want to get on in this world and experience those consequent higher human emotions.

Understanding the Macquaries' Enemies in the Colony.

Here, I want to deal with images as a means of understanding the Macquaries' enemies in the Colony. Take the character of this John Macarthur, by way of example. First, the public portrait the world has of him; it is there for all to see

in the Mitchell Library, Sydney. It is the very image he wanted to project to the world. Nobility, landed gentry – so, on viewing it, do we proclaim as intended!

SLIDE 9: MACARTHUR, THE PASTORALIST

But this is not the man circumstances forced the Macquaries to deal with; this does not convey the malign forces at war with their noble ideals. For to meet this man and the danger he represented, we must turn to a caricature of him. The artist is Hugh McCrae, poet, and a collaborator and mate of Norman Lindsay.

SLIDE 10: JOHN MACARTHUR – A CARICATURE (c1920/30)

The portrait, in pencil, light of touch, only in outline, has the character of a shadowy mental image. Here is someone who could look down on you, even though he be on a level below you. It is of a man, at once haunting, ghostly, menacing, dangerous and destructive, certainly stormy, perhaps even mad. Do we not have here McCrae's revelation of a malign (even demonic) spirit at work in the Macquaries' world?

There was nothing noble about the character of this man. This larger-than-life personality was primed to move through life on a constant war footing. Every challenge to his material interests, every perceived slight, however minor or unintended, brought volleys of fire as part of a campaign of personal hostility designed to destroy.

And destroy the Macquarie way he did. For Macarthur charmed the elitist Bigge, who liked what he had to say about the Colony's potential pastoral future, and about the convicts' and emancipists' benighted part in it.

The message from this is clear: when images are to be read and inform, as opposed to illustrate and decorate, not any image of a person, building, or whatever, will do.

The Macquaries' Enemies Amongst London's Enlightened Intelligentsia.

The Macquarie story is presented here as an enlightenment. Surely, then, the Macquaries would have had the comfort of knowing Britain's thinkers were behind them? Sadly not! The exhibit, as illustration for this purpose, is the great Jeremy Bentham, a contemporary of the Macquaries. Here he is in Watts' famous image:

SLIDE 11: JEREMY BENTHAM

Jeremy Bentham was born in 1748. A precocious intellect, he went up to Oxford University in his early teens, then subsequently studied law, but never practised as a barrister. Rather, he chose to be a legal philosopher. His professional predilection was to understand the world by way of legal theory, moral precepts, and ideology. What he needed to know was in his head, his reading, and his immediate, limited world, there to be discerned, thence to be distilled in terms of principles suited to practical application. To Bentham, the problems of this world he chose to address, though practical, were properly treated as intellectual. On this basis, apparently, he proceeded to deal with the punishment of criminals.

Not surprisingly then, what Bentham had to say about the philosophy of punishment in respect of fairness and proportionality – and other matters – merits the intellectual status and admiration which today it is accorded. But in the eyes of the worldly-wise farmer and match-hardened soldier, Lachlan Macquarie, what Bentham thought about punishment as it applied to convict rehabilitation would have appeared utter rubbish.

An innovative British proposal for the punishment and reform of criminals around the time of the Macquaries was the treadmill. Its significance here is that it might incorporate Benthamite ideas, and indeed as a punishment had Bentham's support. Contemplate, then, this image of a treadmill at Brixton prison.

SLIDE 12: THE TREADMILL AT BRIXTON PRISON (1821)

The central observation tower reflects the Benthamite idea of the inmates needing to be under constant observation – an essential element of his panopticon prison – and the treadmill itself meets his requirements of prisoners experiencing constant hard work. Moreover, punishment could be graduated so as to be proportionate to the seriousness of an individual offender's criminality – an element of punishment so essential for Bentham. The treadmill had a practical purpose in addition to being punishing; it turned giant millstones. It was in respect of this that Bentham explained – coldly, picturesquely – the punishment principle thus: prisoners being ground honest.

Now, compare this image with the accompanying image of a factory scene. It is British, but it might be from the Macquaries' Sydney, and the men convicts,

serving their term of transportation, not in a prison, rather working for the government or on assignment with a free settler.

SLIDE 13: A FACTORY SCENE (c1806) (Pyne and Nattes, artists)

Perhaps the futility, the silliness – indeed, consequent cruelty – of Bentham's thinking in respect of the treadmill now strikes us harder? The work itself was unskilled, and left the prisoners with nothing of which to be proud; the circumstances of the work were degrading, and of no relevance to the prisoners' future lives. By way of contrast, transportation – specifically, the circumstances under which convicts might serve their term of penal servitude – closely approximated a then normal working-life in the community, and had the potential to provide skills and opportunities facilitative of reform and renewal.

For the main body of convicts who were sent to the Colony, the principal causes of their offending were not personal indolence or intrinsic badness. Rather, the cause was the social malaise in which many had found themselves and from which they did not have the personal means of extricating themselves. They did not work, because there was not work; they stole, were sometimes violent, because they were desperate and embittered; they caroused and lived in wretchedness because they became afflicted with a personal malaise. Their criminal behaviour was morally wrong, but for most it did not spring from a deep-seated moral wantonness.

Along with this, most importantly, the majority of these people would live at least reasonably decent lives – indeed, often very good lives – if the opportunity was open to them. But it would not come through Bentham's punishment.

Such was the basis of the Macquaries' championing liberty over confinement, normalcy over contrivance, for the greater body of the convicts.

The Macquaries' Demise.

Now, passions underlying sentiments such as those expressed in Macquarie's letter to his Uncle have the potential to animate their hosts to do great things; the potential to destroy a man and woman in the face of failure.

And destroy Macquarie they did. For Macquarie was not giving the British government what it wanted: a place for punishment. Rather, he was attempting to create for the convicts a land of opportunity. Bigge, the

Commissioner, duly saw the Macquaries' work as the British government had wanted; and he gave them a plan, one aimed at reinstating the Colony as a place of punishment and at stamping the emancipists with a permanent taint.

The way of reform and renewal was defeated. The way of punishment and exclusion had won.

For Macquarie, failure wrought mental destruction. Macquarie's portrait, painted during his last days in the Colony by Richard Read, allows us to get inside Macquarie's head and enter his world at this time, and so understand his mood.

SLIDE 14: RICHARD READ'S LACHLAN MACQUARIE (1822) (Mitchell Library – Sydney)

Contrast this portrait of Macquarie with Opie's, less than twenty years earlier. There he projects youth, vibrancy, and optimism – a man who expects the best is yet to come. How different now! Wizen, haggard, lifeless, broken, finished – a man who has lost all and expects nothing in his remaining days. Indeed, the stare of Macquarie's eyes suggests a man who has been left shell-shocked, and now beholds an abyss. I understood this image much better when, on a visit to London's National Portrait Gallery, I came across Sir William Orpen's portrait of Winston Churchill in 1916 after the disaster of Gallipoli, which left many tens of thousands of men dead and the reputation of this most ambitious man in tatters. The artist described him as a 'man of misery' at the time. For his part, Churchill found the image confronting, expostulating, 'It is not a picture of a man, it is a picture of a man's soul'. As for Churchill, so for Macquarie. The spirit of Macquarie's first wife, so alive in his soul, had driven him to his personal destruction.

In regard to the use of images in the writing of this book, the message from this is clear: when images are to be read and inform, as opposed to illustrate and decorate, one image of a person, building, or whatever, will not always suffice.

As to Mrs Macquarie, her health was failing, but her indomitable spirit remained. What is presented in this story is not Mrs Macquarie as governor's wife, but as what she was in effect, namely co-governor. Along with this, she played the role of attack dog when anyone upset or attempted to thwart her Beloved. Something to which Marsden bore painful witness. Marsden's letter to Bigge, referred to above, also included the following:

Both profane and sacred History hath taught us, that it is very dangerous to offend a Lady in Power – John the Baptist lost his Head for this.

SLIDE 15: MARSDEN'S LETTER TO BIGGE (re Mrs Macquarie) (March, 1821) (National Archives – London)

The fact is, colonial life and social elevation brought out another side of Mrs Macquarie's character. Now, no longer the retiring, gentleman's daughter and future wife of an officer. Rather, when it came to policy, she assumed the role of co-governor – the above references to her are illustrative, far from exhaustive. Indeed, Mrs Macquarie as active, not passive, was captured so powerfully by her colonial portraitist. Consider Richard Read's 1819 image of her:

SLIDE 16: RICHARD READ'S MRS MACQUARIE (1819) (Tasmanian Museum and Art Gallery)

Not here demure, sweet, passive, as in her 1810 portrait. Rather, head erect, though with a slight forward thrust; a determined expression framing piercing eyes; energized and purposeful; a woman on the move, on a mission, one who will speak out, who will take no prisoners. The force of this most talented woman's personality is patent. Though this strength is not raw, but cloaked in a mantle of femininity – always to Lachlan his 'dear Elizabeth'.

If Manning Cark, and others, had looked at, understood, this image, they may have interpreted the Macquarie governorship differently. Images matter.

THE MACQUARIE STORY AS A HISTORY TALE FOR TODAY

My book makes two big claims for the Macquaries' work in their convict Colony. The first is that the sentiments underlying Lachlan and Elizabeth's treatment of the convicts, and the essence of the policies they begat, represent not simple humanity but something much greater, namely, an enlightenment in the treatment of crime and criminals. The second big claim is that these policies represent no less than a history tale for today.

The Macquaries' Policies as Enlightened.

Meet Winston Churchill as you may not have seen or heard him before. It is Spy's take on him in a 1900 number of Vanity Fair.

SLIDE 17: THE YOUNG WINSTON CHURCHILL

This is the young Churchill, not long before a courageous cavalry officer in the British army, now an ambitious, worldly wise man about town, and soon to be Home Secretary. It was in the last role, in answer to a parliamentary question, that he uttered these most majestic words:

SLIDE 18: CHURCHILL ON CRIMINAL JUSTICE (1910)

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country ... [A] constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man – these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.

Just prior to making this statement, Churchill had informed the House of his having made a general grant of remissions totalling 500 years across the prison population – done, he assured the House, to no ill-effect.

What about them is intrinsic to civilization? Briefly: these elements represent the antithesis of punishment as the expression of vengeance; moreover, Churchill's criteria are also intrinsic to civilization because they call upon those human qualities and actions we regard more generally as admirable – forgiveness, charity, the outstretched helping-hand, humane forgetfulness, acceptance, understanding, empathy, all these and others – and especially when manifested in the face of a natural inclination to the contrary.

The Macquaries' policies clearly satisfy the Churchill test. Thus, as in the above examples, Macquarie's threshold for harsh punishment was high, both he and his wife promoted measures favourable to rehabilitation, and Mrs Macquarie's Female Orphan School declared that even the children of the convicts were to be treated as treasure. These policies are but a few of those in the Macquaries' catalogue of civilized punishment.

How different from the policies of the then British government – the Macquaries' masters! First, consider a 'constant heart-searching' in respect of the punishment of offenders. The convicts were sent to the Colony as punishment in order to deter criminal activity at Home. This was based on the

Government's blind belief in the efficacy of punishment as a deterrent to all crime and criminals. And when transportation did not result in less crime in Britain, the assumed solution was ever harsher circumstances and punishment for the convict, especially the recidivist. The thought that other causes – social causes – might lie behind Britain's increasing crime rate appeared never to enter – perhaps was not allowed to enter – the British mind.

Second, the British government by way of its form of punishment – transportation – absolved itself of any immediate responsibility for convict reform and renewal. Once there, some convicts might reform, but let it be in their own hands. If convicts did not have it within themselves to change, so be it.

As to an 'unfaltering faith' in the convict heart concealing 'treasure' ripe for discovery – well, the converse was true of the British government. In this circle of men there was actually an unfaltering belief in there being no treasure in the convict heart – a view entrenched in the mind of the then Home Secretary, Viscount Sidmouth, in particular. Little or no good could come from them. An important reason for transportation, as we know, was the removal of the convict from decent society. For the convict was perceived as a moral canker, not only causing the good to suffer, but also – this is what made the convict truly frightening – having the potential to corrupt the good.

In light of this, it can be said the Macquaries' sentiments and policies towards the convicts were not simply civilized, they represented an enlightenment in criminal justice. But what about today?

The Macquaries' Policies as a History Tale for Today.

The Macquaries left the Britain of their day with an achievement and a challenge. This was their legacy. The achievement was those many of their convicts who, had they remained in Britain, would not have gone on to live productive and happy lives. The challenge they left Britain was to understand and to value the principles at work in their treatment of these convicts, and thence to adapt this treatment to the social circumstances there. It represented an enlightenment then. Two hundred years later it still represents a challenge and enlightenment. It should be treated as a history tale for today.

For exactly the same punitive thinking and attitudes about crime and criminals remains pervasive in Britain and Australia, and to a greater or lesser extent

around the world. Our public discourse on crime and punishment is infected with a strong punitive mentality. The elements of this thinking are various. More offenders, minor offenders aside, sent to prison – ‘put behind bars’, no less – and for longer terms. One aim, greater condemnation of the criminal. Another aim, the protection of the law-abiding community, with no thought that the effectiveness of deterrence may vary with the circumstances of the offender. Rehabilitation of offenders no more than tolerated, and with the proviso that it not interfere with harsh punishment. Offenders described with abandon in general conversation and labelled in the press in derogatory terms, terms portraying them as bad – even evil – whose prospects as citizens of any moral worth are dismissed, assumed to be negligible. And so on.

Yet, in this benighted public discourse, there are articulate expressions of enlightenment. Though they manifest a rare humanity and understanding, there fate is to be foolishly ignored or wantonly dismissed, even ridiculed, as the naïve views of the ‘out-of-touch’ or ‘soft-touch’ dreamer. To the common man and woman they just lack common sense; to the instinctively harsh, they represent weakness.

Most articulate expressions of enlightenment in criminal justice are to be found in two Victorian appellate court judgments; they are complementary, though delivered almost forty years apart.

The first is the late Sir John Starke’s dissenting judgment in the 1975 case of Williscroft. There he opined:

It is often taken for granted that if leniency for the purpose of rehabilitation is extended to a prisoner when the judge is passing sentence, that this leniency bestows a benefit on the individual alone. Nothing, in my opinion, is further from the truth. Reformation should be the primary objective of the criminal law. The greater the success that can be achieved in this direction, the greater the benefit to the community.

SLIDE 19: STARKE ON PUNISHMENT (1975)

To appreciate the real significance of these sentiments, it is as well to remember that the offending in this case constituted a serious armed robbery.

This prioritizing of rehabilitation over punishment is pure Macquarie.

Fast-forward to 2012. The case before the Court involved a particularly nasty home invasion. The judgment itself was delivered by the President, Justice

Maxwell, one of the two other judges being Marcia Neave, now of this Law School. In the course of this judgment on behalf of the Court, Justice Maxwell observed:

In so concluding, we [the Court of Appeal] do not overlook the powerful submission advanced by senior counsel for AH concerning the severe disadvantages from which AH has suffered lifelong. According to the unchallenged expert evidence, intelligence testing revealed AH to be in the "extremely low" (borderline) range'. He has 'poor impulse control, low frustration tolerance and [a] sense of being overwhelmed by multiple or complex demands'. He had an 'impoverished education', staying at school only until year 8. His home life was unhappy. His parents separated when he was two or three years old. He suffered physical abuse from his stepfather and was neglected by his mother who (according to AH) 'was addicted to prescription pills, always off her face, passed out, didn't care'.

At the time of sentencing, AH was diagnosed as suffering from clinical depression. According to the forensic psychologist ... AH had suffered depression for many years, with his drug problem 'only aggravating this underlying problem'. AH had begun to use heroin at the age of 13. This habit had continued for more than a decade. AH was also a long-term marijuana user.

Counsel for AH submitted that 'those with few choices make bad choices'. Moreover, counsel submitted, repeated lengthy terms of imprisonment were unlikely to assist AH in overcoming any of these serious disabilities. Public money spent on imprisoning people like AH would be much better used, he contended, if it were directed at tackling the causes of disadvantage.

Sadly, the profile and life history of AH is all too familiar in the criminal courts. The submissions made by counsel raise issues of fundamental importance concerning the social context of criminal behaviour and the inefficacy of imprisonment as a response. The orthodox approach to criminal responsibility, however, requires that a person like AH is viewed as morally as well as legally responsible for the choices he makes.

In the present case, AH chose to instigate and participate in — in the ways we have described — a very serious offence. It was not said on his behalf that he fell into one of those categories — mental illness or intellectual disability — where moral culpability for criminal behaviour is mitigated. That being so, the judge was obliged to sentence AH within the sentencing parameters fixed by Parliament, and in accordance with established sentencing principles.

SLIDE 20: MAXWELL ON PUNISHMENT (2012)

This understanding of punishment as reform is pure Samuel Johnson.

As the Macquaries had challenged the Colony and the British government to consider another way of treating the convicts, so these two judges are challenging the community to consider another way of treating crime and criminals.

Observations such as these, when they become public, are apt to evoke amongst the majority of the community first cries of dismay, then outrage, they believing themselves to be victims of judicial softness.

Moreover, the public has a ready explanation for this softness. The judges are ‘out of touch’: they lack the common person’s common sense; they do not understand the peoples’ everyday fears; they live in a cocooned ‘other world’.

Back to images, and perhaps their potential power to challenge the public’s thinking in this respect.

The chapter in which this material was presented was all words; it needed lightening; images as illustrations would do. In any case, surely the readers would be wondering what these two ‘soft’, ‘out of touch’ judges looked like. The first portrait I obtained was of Starke. It required skilled digital cleaning; the product delighted me.

SLIDE 21: SIR JOHN STARKE

I asked the man who did the work on the images what he thought of it, so giving him the opportunity of lauding his abilities. His answer took me aback: ‘He looks terrifying!’, he exclaimed in a voice just shy of quivering. Perhaps this image, it then occurred to me, is more than an illustration; perhaps it has the potential to challenge the stereotype of judges as ‘soft’.

There is a second research message here: as text may require an image, so an image may demand text.

In light of this, look at this portrait of Justice Maxwell. This was one of a number offered to me by Justice Maxwell. At first, one reason for choosing this particular image was its vibrant colour, whilst preserving judicial dignity. O how the dark text required lifting! Then came the new perspective on the Starke image, and in light of this a new perspective on the Maxwell image.

SLIDE 22: JUSTICE MAXWELL

Justice Maxwell is seated in his chambers, and – this is what is critical here – the picture on the wall behind him was painted by his then primary-school daughter and her classmates. Might not this image prompt the viewer to ask questions: Judges as ‘out of touch’? Judges as cocooned from everyday fears? Perhaps, also, this image might have the potential convey an answer, to change thinking?

KAAPAY AND KUYAN

SLIDE 23: ‘KAAPAY AND KUYAN’, ROSELLA NAMOK (2018)

The aim of this book is to challenge the current punitive climate; its raison d’être being to promote as an alternative the sentiments embodied in the words of Starke and Maxwell by way of the Macquarie story. In doing this, two ways and two types of people have been identified with respect to the treatment of crime and criminals. There are those whose predilection in cases involving all but the less serious offender is to condemn, punish and leave morally stained, and those whose preference is to understand and, where appropriate, to attempt to reform and renew. Is there a motif encapsulating this idea? I suggest there is. Several years ago in London I happened upon a print of a painting by the Aboriginal artist, Rosella Namok, of the Lockhart River. Titled ‘Kaapay and Kuyan’, it represented the traditional understanding of social organization among her people. She expands upon the underlying idea, thus: ‘Everything is divided two ways ... people, lands, story places ... they belong one way or other way ... it’s important you know which way’. Following from this, there will be a ‘right way’ and a ‘wrong way’ of doing things.

This led to my commissioning Rosella Namok to paint ‘Kaapay and Kuyan’, as applied to the treatment of crime and criminals and to the two ways and the two groups identified in this story, namely: the Macquaries’ way and the way of their opponents and detractors; present society’s punitive majority and its enlightened minority. Here is this painting, primary within the text, providing an embedded framework for the arrangement, selection and interpretation of material between and within the chapters.

The ovals are Namok’s ‘Kaapay and Kuyan’ motif. The colours – Lockhart River ceremonial pigments – are specific to the Macquarie story and its message. Yellow ochre is the way of reform, inclusion and hope; black, the way of punishment, marginalization and further degradation. White proclaims this a story of enlightenment; red ochre warns against the wrong way.

I note parenthetically, the two elements of the Kaapay and Kuyan motif not only represent something specific, but also their proper difference. The relevance of this other aspect of Kaapay and Kuyan comes into play in regard to the punishment of actual offenders.

This painting serves to acknowledge that the Macquarie enlightenment took place on the land of a dispossessed people, and that these same people offer us imagery and stories to represent and interpret aspects of our European history and to enrich our present-day understandings more generally.

EPILOGUE

Manning Clark in 1954 observed in an essay on the writing of history, thus:

History, to be great as history, must have a point of view on the direction of society. It must also have something to say, some great theme to lighten our darkness ...

I would want to add a third element: History, to be great as history, must aim to enlist champions of enlightenment. One can but aspire!

A closing note: This book, in view of its content and the role of images, is offered as one of the 'Law's Picture Books', as that term is understood by Mike Widener, Yale Law School librarian, who presented the 2017 Rare Book Lecture on this subject.

THANK YOU.