Should history be rewritten in line with modern day views of human rights?

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> 'When I saw the house of Artemis that mounted to the cloud…I said, "Lo, apart from Olympus, the Sun never looked on aught so grand"'[1]

Thus Antipater of Sidon described the Temple of Artemis, one of the Seven Wonders of the Ancient World, which had towered over Ephesus since 550 BC. But in 356 BC, the chroniclers recorded, a disaffected youth of humble birth, desirous of everlasting fame, set fire to the temple in a senseless act of egotism and destruction. He was promptly found guilty and put to death; but in order to deny him the immortality he sought, the Ephesian magistrates ordained in addition that the arsonist's name, upon pain of death, should never be uttered again – the terrible fate later known as *damnatio memoriae*.

The entanglement between law and historical memory, in other words, has venerable origins. Long before the current debate about the propriety of memorialising slaveowners and secessionists, the law was being used to erase from history those considered unworthy of remembrance and to entrench state-sanctioned historical narratives. Nor are such practices the exclusive preserve of less enlightened times: in Europe alone, at least half a dozen European countries today have so-called 'memory laws', which impose a certain view of history, backed by the full force of the state. Spain has banned memorials to Francoists, Ukraine monuments to Communism. In Germany to deny the Holocaust is forbidden; in Russia it is a crime to state that the USSR invaded Poland. So far, England and other common law jurisdictions have generally steered clear from such legislation, but in an age acutely aware of past violations of human rights, it does not seem outlandish that the process of historical revision, hitherto carried out through other means in these countries, might eventually be advanced through a legal framework. History is not written in a vacuum, and naturally over time tends to transform itself to fit with modern sensibilities. However, if the speed of change is found to be lacking – and many clearly are of that opinion – should we consider bringing in the law to shape history's transformation in line with modern day views of human rights?

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[1] Antipater, *Anthologia Graeca*, IX.58.

The natural point to start such an inquiry is to examine the limits, if any, of free speech, but as the question has been more than extensively canvassed by brighter minds, it might be worthwhile to take a more practical route and to consider how legal control of historical memory might work in practice. In 1996, the Holocaust denier David Irving sued Penguin Books and the historian Deborah Lipstadt for libel: she had called Irving a falsifier of history and a bigot.[2] Though Mr Justice Gray insisted at trial that the judicial function is not 'to make findings of fact as to what did and what did not occur during the Nazi regime in Germany', the case turned almost entirely on evidence – often technical in the utmost – tendered by professional historians concerning precisely that. The case took three years to go to trial, was heard over thirty-two days, and the final judgment ran to 900 paragraphs. The Holocaust ranks among the best documented and most studied events in history, yet it took a gargantuan effort to rebuff the fantasies concocted by a rank liar. Mr Justice Gray and Professor Lipstadt must be commended for their thoroughness and industry in rebutting Irving's denialism, but it is only fair to add that if such history-based litigation became more common the Queen's Bench Division will soon transact little other business.

Next, it is worth considering whether the law is capable of capturing the full range of nuances that historical judgment necessarily involves, and to deal with the uncertainty that is part and parcel of the study of times beyond 'the memory of men yet living'.[3] Cromwell, for instance, was responsible for some of the worst human rights violations ever committed in the British isles, yet one does not need to be a proto-genocidaire to simultaneously acknowledge that he was a good leader and a man of his times who played an important role in England's rocky road to constitutional government. How is legislation to capture such contradictory yet compatible assessments? How is Parliament to adjudicate on the most debated period in English historiography? If Cromwell is to be written out of history by statute, are we to ban Milton's and Carlyle's encomiums of him as well? And are judges – who, despite Lord Sumption's hope[4], are increasingly studying Law rather than History at university – really well-positioned to wade into controversies that

[2] *Irving v. Penguin Books Limited, Deborah E. Lipstadt* [2000] EWHC QB 115

[3] Thomas Babington Macaulay, *The History of England from the Accession of James the Second*, vol. 1 (London: Longman, Brown, Green, and Longmans, 1848), 1.

[4] Lord Sumption, 'The Historian as Judge – Address to the Administrative Appeals Chamber/Immigration and Asylum Chamber judges', 6 October 2016. Accessible at https://www.supremecourt.uk/docs/speech-161006.pdf

have flummoxed historians for generations? To ask these questions is to answer them.

Finally, to make something taboo is to make it irresistible. Wise parents know better than tell the toddler not to touch the kettle without explanation, just as experienced counsel know to advise their client if a libel suit will attract more attention to the original slander than if it had been ignored. Sunlight is the best disinfectant, and if left alone the never-ending process of historical debate will usually lead to the right results. Confederate monuments came down not because of legal coercion, but because distorted narratives of the American Civil War have been exploded by careful historical work and by the collective reassessment of those events. A David Irving in an Austrian prison can claim martyrdom; but an Irving debunked through the usual process of historical inquiry is simply a pathetic footnote. If you are still in doubt, the arsonist I mentioned at the beginning was named Herostratus. To make his name *verboten* simply encouraged posterity to remember it for as long as history shall be written, while the names of the Temple's builders are lost to us forever. 'The iniquity of oblivion blindly scattereth her poppy', was how Sir Thomas Browne described the injustice; but had the unwise Ephesian judges treated Herostratus as a common criminal his fame would not have outlasted stone.[5]

1000 words

[5] Sir Thomas Browne, 'Hydriotaphia, Urn Burial, or, a Discourse of the Sepulchral Urns lately found in Norfolk', in Simon Wilkin (ed.), *The Works of Sir Thomas Browne*, vol. 3 (London: H. G. Bohn, 1852), 44.