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A Message from the Dean

Professor Joellen Riley

The news of late has been quite depressing for a dean of a law school — even for the dean of an exceptional faculty of gifted students and scholars such as ours. For a while now, commentary in specialist legal news magazines, and in some of the mainstream press, has warned of rising unemployment for law graduates — at least for those graduates aspiring to conventional careers as solicitors in commercial law firms. More recently, reporting about the ‘deregulation’ of universities has raised the spectre of significant fee increases for students. Young people aspiring to study law must be especially concerned, given that law is now a second degree, studied in combination with or after a degree in another discipline. It concerns me that some intelligent and gifted potential aspirants, notwithstanding the dark prospect of rising university fees, may be discouraged from pursuing a law degree in this environment. And that would be a considerable tragedy.

As this issue of Jurist·Diction illustrates, studies in law open up a wide range of potential careers. Alumna, Chloe Flynn, is using her legal education to pursue a career as a television producer. It is pleasing to read how much credit she gives her legal education to many issues of contemporary importance.

Other articles in this issue, focussing principally on media and the law, affirm the relevance of a good legal education to many issues of contemporary importance.

The debate about freedom of speech, and whether it is such a vital human right that it ought not to be curtailed, even by anti-discrimination law protections against hateful vilification, is taken up by two alumni, renowned author and journalist David Marr, and Daniel Ward, a recent university medallist and this year’s recipient of the Peter Cameron Scholarship. Professor Barbara McDonald, a much loved member of our teaching staff for many years, writes on her recently completed enquiry into Serious Invasions of Privacy in the Digital Era for the Australian Law Reform Commission. Associate Professors Thomas Crofts and Murray Lee explain their recent project on ‘sexting’ and youth. Young people who invade their own privacy by texting lewd scripts and talent. A typical day might see her wrangling a leather-clad rock-n-roll icon, a lion tamer, and almost anything in between.

Taking a leap of faith, she accepted the job offer. The following year, she was promoted to the role of chief of staff at The Morning Show and, in 2010, took on her current role as Supervising Producer. In 2013, she helped launch a second news and entertainment program, The Daily Edition, where she is Acting Supervising Producer.

The dual role sees her oversee the content of three and a half hours of live television every weekday, including stories, scripts and talent. A typical day might see her wrangling a leather-clad rock-n-roll icon, a lion tamer, and almost anything in between. ‘What I love is the blend of the serious news cycle and entertainment,’ she says. ‘Plus the challenge of making people care about stories they may not otherwise have exposure to.’

Chloe Flynn

Chris Rodley
features

All the World's a Stage
Protecting Privacy in an Open World

Barbara McDonald

If Shakespeare were coining the phrase ‘All the world’s a stage’ these days, he would probably be referring to a world where it’s possible to track, record, aggregate and display the fine details of every man and woman’s life for all to see.

The details lie in various pieces of electronic or digital data created willingly or unwittingly by us all, as we conduct our business and personal lives. Some internet gurus and social commentators may denounce privacy as ‘dead’, but individual citizens, parliamentarians, regulators and judges and others continue to fight for its survival.

Privacy is a precious ingredient of a person’s autonomy, freedom and ability to lead a fulfilling life. Governments and commercial entities, the media, even social media platforms, earnestly assure us that they take our privacy seriously. Yet it seems that every week we hear of a new invention — a pair of glasses, a drone, a body scanner — that can, sometimes in a relatively short period of time, lay bare and record what we are and what we are doing. The law on privacy has progressed further and more quickly in other countries than in Australia. While we have had federal data protection or information privacy laws in Australia since 1988, together with similar laws regulating state and territory government agencies, we do not have the level of explicit legal protection against invasions of individual privacy that can be found in the United Kingdom, many Canadian provinces, New Zealand, France, Germany, Singapore and elsewhere.

Probably the most commonly used metaphor to describe privacy protection in Australia is that it’s a ‘patchwork’. What is clear is that it is very difficult for an ordinary person to find exactly where and how they can use the law to protect themselves from what they see as invasive conduct by others.

This is not helped by our federal-state divide of legislative responsibility, under the Australian Constitution.

Over the last year, I have been fortunate to lead the Australian Law Reform Commission’s inquiry into Serious Invasions of Privacy in the Digital Era, with terms of reference requiring the Commission to take an innovative approach to how the law might prevent or redress serious invasions of privacy, while appropriately balancing other fundamental values such as freedom of speech. It’s been a fascinating but challenging experience. I have been ably assisted by a team including Sydney Law School alumni, Steven Robertson (BA 2002, BA(Hons) 2005, LLB 2008, PhD Arts 2014) and Brigid Morris (BSc 2009, LLB 2011), and a succession of volunteer interns including Sydney Law School students Timothy Maybury (JD final year) and Jackson Wherrett (BA/Media&Commun) 2012, final year LLB). Our team has also benefited greatly from the experience and wide legal knowledge of former Sydney Law School academic Professor Rosalind Croucher (BA 1977, LLB 1980), the President of the Commission, while the Advisory Committee included Associate Professor David Ralph (BA 1997, LLB 1999, PhD (Law) 2005) of Sydney Law School, an expert in media law, and several law alumni with expertise in media, communications or privacy law including Henric Nicholas QC (BA 1961, LLB 1964); Edward Santow (BA 2001, LLB 2003); Director of the Public Interest Advocacy Centre; Professor Graham Greenleaf (LLB 1973, DipEd 1976, BA 1976) of the University of New South Wales and Peter Leonard (BSc 1978, LLB 1980, LLM 1991) of Gilbert & Tobin Lawyers.

Because privacy concerns are raised in so many different contexts, submissions and stakeholder comments have come from a very wide cross-section of the community. They have included media organisations and journalists, banks, government departments, libraries and archives, professional photographers, social media platforms, advertisers, schools, health authorities, retailers, domestic violence and community legal centres, academics, farmers, animals rights activists, civil liberty groups, national security organisations, law enforcement bodies, residential neighbours. All of these groups have opinions on, and sometimes a stake in, the way the law protects the rights of individuals to go about their lives with some privacy, while also balancing the rights of others to conduct their own occupations or businesses or to exercise their own personal freedoms.

The two main types of privacy invasion with which the ALRC has been concerned are: unjustified disclosures of a person’s private information; and invasions into a person’s bodily privacy or private space, affairs or activities.

Laws protecting information privacy clearly compete with freedom of speech, a contentious topic in the Australian community recently in the context of racial discrimination laws. Just as it is almost universally recognised that freedom of speech is not an absolute value in a civilised society in that context, so too is it recognised that freedom of speech and privacy must be balanced. The difficulty is how to do it and where the boundaries should be drawn. Boundaries will undoubtedly change with the times and with community expectations. They will depend too on the boundaries that the claimant has manifested to others. It is not possible for Parliament to legislate for every situation, so the balancing act must be left to the courts or whatever other regulatory body — such as a privacy commissioner or the Australian Communications and Media Authority — is given the power to hear disputes, take action or grant remedies.

Intrusion into someone’s private sphere is more difficult to adjudicate upon. Everyone’s home is his or her castle, and it is straightforward to complain of intrusion when someone has invaded a deliberate barrier such as a gate, an internet password, or a lock on a file or an account. But do people lose all reasonable expectation of privacy of their every activity when they step outside? Is there any limit that should be placed on the recording and filming of other people’s personal moments in public or the broadcasting or worldwide communication of those moments on the web? The key part of the ALRC’s final report, to be delivered to the Attorney-General at the end of June 2014, will be the detailed legal design of a cause of action for serious invasion of privacy. The decision as to whether to implement any part of the report will be up to current and future governments. The need for, or desirability of, a new statutory action to protect individuals depend greatly on when and how the common law develops. But the report will also suggest other ways that existing laws could be amended or supplemented to bring Australia closer to the protections found in other countries and to iron out some of the anomalies in the legal patchwork.

Further Reading


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Sexting and Young People

Thomas Crofts and Murray Lee

Imagine you are a teenager. You take a semi-nude photo of yourself with your mobile phone. Perhaps you decide to send it to your boy/girlfriend as a bit of fun or to be flirtatious. What if the boy/girlfriend passes this image on to other friends to brag about what a ‘hot’ girl/boyfriend he or she has? Would you feel flattered? Confident? Embarrassed? Then you split up and the ex-boy/girlfriend distributes the image to friends or your family in an act of revenge. Would you feel betrayed? Angry? Violated? Wish you hadn’t taken the image? Wish your ex hadn’t sent the image on? Not care, because it was only a bit of fun and anyway lots of teenagers take and distribute semi-naked images of themselves?

All of these scenarios are possible. But would you also think that you could be liable for a child pornography offence? Do you think it is right that you could face conviction for a child pornography offence? Do you think it is right that you could face conviction for a child pornography offence and placement on the sex offender register for ‘sexting’? These are just some of the issues that we are investigating with Dr Alyce McGovern and Dr Sanja Milivojevic from the University of New South Wales, in a research project funded by an Australian Institute of Criminology Research Grant (CRG) and supported by the NSW Commission for Children & Young People and Sydney Law School.
between 2008 and 2011, estimated that response to sexting? engage in the behaviour. general and the motivations of those who were likely to be pressured into sending a image. Here, we see that what they thought the reason was for sending a image only to this behaviour.

The answer appears to be ‘no’. Even the newspaper that had estimated (in 2011) that hundreds were being prosecuted, reported a year later that in the past four years only two teenage boys had been charged with child pornography offences under the Commonwealth Criminal Code and five others had been given a caution (The Herald Sun, 1 October 2012). Neil Paterson, Acting Commander of Victoria Police, also noted in 2013 that there had been no prosecutions under child pornography laws of a young person for sexting alone. This suggests that police are using discretion not to prosecute but to caution in cases where sexting comes up in the attention of people but there are no aggravating factors.

So, what should be done about sexting? In many ways, sexting is not new behaviour and in this new context there are serious issues. So, what is the reason for this? There is a perception that girls, in particular, are more likely to be pressured into sending a image. We also asked the respondents what they thought the reason was for others to send sexts. Here, we see that there is a perception that girls, in particular, are more likely to be pressured into sending a image. This suggests that there is a significant difference between the perceptions of young people in general and the motivations of those who engage in the behaviour.

So what about the social and legal response to sexting? Our review of the media found that early media reports, particularly between 2008 and 2011, estimated that young people were being prosecuted in their hundreds for child pornography offences in relation to sexting (see, for example, The Herald Sun, 11 October 2011). We therefore investigated whether it was possible that young people could be prosecuted and sought to discover whether this really was happening. In recent years, the federal government has taken the lead in strengthening child pornography laws, in line with its international obligations. New technologies are thought to be fuelling the exploitation of children by increasing demand for ‘ever greater levels of depravity’, although also ‘through the repeated distribution of the image, or images, through international networks’ (Criminal Justice Division, Attorney-General’s Department (Cth), Proposed Reforms to Commonwealth Child Sex-Related Offences (2009) 44).

Under the Criminal Code Act 1995 (Cth), child pornography is now defined to include depictions, representations or descriptions of a person who is, or who appears to be, under 18, engaging in, or appearing to engage in, sexual activity or a sexual pose, or being in the presence of a person doing or appearing to do the above. It also extends to depictions, representations or descriptions for a sexual purpose of the sexual organ, anal region or breasts (of a female) of a person who is or who appears to be under 18. In all instances the material must represent, describe or depict the material in a way that the reasonable person would find in all the circumstances to be offensive. This definition means that it is possible for young people to be prosecuted for child pornography offences for creating, possessing and disseminating child pornography offences (for example, The Herald Sun, 11 October 2011). We therefore investigated whether it was possible that young people could be prosecuted and sought to discover whether this really was happening. In recent years, the federal government has taken the lead in strengthening child pornography laws, in line with its international obligations. New technologies are thought to be fuelling the exploitation of children by increasing demand for ‘ever greater levels of depravity’, although also ‘through the repeated distribution of the image, or images, through international networks’ (Criminal Justice Division, Attorney-General’s Department (Cth), Proposed Reforms to Commonwealth Child Sex-Related Offences (2009) 44).

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The Committee is also recommending a new defence for intentionally distributing or threatening to distribute an intimate image of another person without that person’s consent. This offence recognises the growing problem of adults also distributing images without consent (for example ‘revenge porn’). In recognition of the fact that criminal law is not the only means of regulation, the Committee also recommends reviewing civil laws and consideration of whether a new cause of action for serious invasions of privacy should be developed.

Changing the law can, however, only do so much. Schools should adopt into their curriculums holistic, integrated programs for internet and communications technologies awareness and safety, and teachers should take part in professional development focusing on cyber safety. Further, media campaigns should focus on the appropriateness of the behaviour of young people exploring the technology, rather than person initially creating the image. In particular, our research indicated that an approach like the one that has been adopted in many countries is unlikely to work. The reason for this is quite simple: many young people already engage in the practice relatively safely, and realise the negative scenarios portrayed in media campaigns are rare. It is the risk involved in engaging in such behaviour that also holds young people back. More fundamentally, sexual ethics, morals, and practices need to catch up with the technological change that living online lives has brought about.

Awards Double for Sydney Law School Couple

They work together and share their lives together. Professors Mary Crock and Ron McCallum even win awards together. Recently, Emeritus Professor McCallum AO was selected for a prestigious Henry Viscardi Achievement Award and Professor Crock named in the seventh edition of Best Lawyers in Australia. Emeritus Professor McCallum was one of 12 recipients worldwide of a Henry Viscardi Achievement Award. The Awards recognise exemplary leaders in the disability community, particularly those who have had a tangible impact on shaping attitudes, raising awareness and improving the quality of life of people with disabilities.

The awards were developed to honour Dr Henry Viscardi Jr, a leading international advocate for people with disabilities and disability advisor to eight US Presidents.

Professor Crock, meanwhile, was named in the 2014 edition of The Best Lawyers in Australia for her work in immigration law.
Willem C Vis International Commercial Arbitration Moot

Professor Chester Brown

The Sydney Law School’s Vis Moot team achieved excellent results at the finals of this year’s Willem C Vis International Commercial Arbitration Moot, held in Vienna, Austria, 11-17 April 2014.

The team, consisting of Matthew Barry, James Argent, Heydon Wardell-Burrus and Dominique Yong, spent months researching and drafting legal memoranda on the procedural and substantive issues arising out of the Vis Moot problem, which concerned an international commercial transaction governed by the UN Convention on the International Sale of Goods (although the applicable law can also be one of the issues in dispute, which was the case this year). International commercial arbitration is the method of resolving the dispute, rather than the national courts of either of the states of nationality of the parties in dispute. The team members were expertly guided and prepared by two coaches, Domenico Cucinotta and Reuben Ray (both of whom were in Sydney Law School’s Vis Moot team in 2010-11), and many members of the legal profession and past Vis Mooters generously gave their time to sit as arbitrators in practice moots.

The team held a traditional ‘demonstration moot’ for friends, family, and others at Sydney Law School on 23 March 2014, at which the arbitrators were Professor Vivienne Bath, Professor Malcolm Holmes QC (Eleven Wentworth Chambers, and Adjunct Professor at Sydney Law School), and Jo Delaney (Baker & McKenzie). The team then left for Europe in early April to participate in ‘pre-moots’ organised by the International Chamber of Commerce in Paris and the Permanent Court of Arbitration in The Hague. The pre-moots provided an ideal opportunity for the team to meet strong competition (from, for example, teams from universities in Brazil, Canada, the United States, Singapore, India and Israel), and to prepare for the team to hit the ground running when the finals began. A highlight was the opportunity to moot in the hearing rooms of the Peace Palace, which also houses the International Court of Justice in The Hague.

As in past years, 300 universities had entered teams in the Vis Moot Finals, making it a tough competition in which to progress beyond the preliminary rounds. The Sydney team had four testing moots in the preliminary rounds against the University of Alexandria (Egypt), Università Commerciale di Luigi Bocconi (Italy), Dar Al Hekma School of Diplomacy and Law (Saudi Arabia), and Penn State (USA). However, we were delighted when it was announced that the Sydney team had eased into the knockout ‘Round of 64’. We are extremely grateful to those who generously made donations to support the team’s participation in this year’s Vis Moot — Clifford Chance LLP, the NSW Bar Association, the Chartered Institute of Arbitrators, and Sydney Law School.

In that round, Sydney mooted against NALSAR from India. In a moot chaired by Sir Anthony Evans (former Lord Justice of Appeal), the Sydney team was victorious. Another tough encounter followed the next day in the Round of 32 against Sciences-Po (France), but Sydney again prevailed. With just enough time for the team to catch its breath, the Round of 16 Moot was against the University of San Diego. Again, Sydney was victorious in a unanimous decision from a panel chaired by Professor Martin Hunter of Essex Court Chambers, London, and one of the leading luminaries from the world of international commercial arbitration.

The Sydney team’s journey unfortunately ended in the quarter-finals where the tribunal awarded the Moot in a split decision to our opponents, the University of Heidelberg (Germany). However, the team’s achievement in finishing in the top 8 of 300 teams is a testament to all their hard work over the six months leading up to the Vis Moot finals.

At the final awards banquet, the team received an ‘honourable mention’ for its Memorandum for the Respondent (that is, its memorandum was ranked in the top 20 of 300) and Dominique Yong was awarded an honourable mention as one of the top individual oralists.

The ultimate winner this year was Deakin University (the only other Australian university to progress to the quarter-finals), which defeated the National Law School of India in a very tight final.

Courting the Fourth Estate

Judicial Perspectives on the Media

David Rolph

They report on matters of great public interest, as well as that in which the public is merely interested. What occurs in courtrooms is often of great public and human concern. It is unsurprising that court reporting has been and remains a staple of news and current affairs. Courts have a complex, sometimes difficult, relationship with the media. The principle of open justice is fundamental to the rule of law. In order to give effect to this principle, courts rely on the media to act as ‘the eyes and ears of the public’. The media are sometimes characterised as ‘the fourth estate’, suggesting that they have a quasi-institutional rule in government and public life more generally. When discussing the role of the media, judges often invoke these metaphors. Views expressed about the media by judges, though, are not always so complimentary.

They do not have a single view of the role and importance of the media. In judgments and in speeches (because judges often talk about the media, if not to them), they express a range of views. As well as viewing them as ‘the fourth estate’ and ‘the eyes and ears of the public’, judges recognise that media outlets can act as educators of the public and as sources of information. On occasion, judges have recognised that the media perform a significant function by bringing the expositor of public abuses. In Australian Broadcasting Corporation v O’Neill (2006) 227 CLR 57, Gleeson CJ and Crennan J observed that, in a liberal democracy, investigating and exposing public abuses is not the exclusive province of the police and the courts; the media play a vital role, too. Without the media performing this function, many important public scandals would have remained hidden. The media can also act as an important conduit between the work of the courts and the general public. These are usually positive characterisations of the media’s role.

There are relatively neutral characterisations of the media’s role. Judges sometimes perceive the media as gatekeepers, filtering what the public learns about the courts and their functions. In other contexts, the media are treated as a citizen, just like any other person, with no greater rights, privileges or entitlements than natural persons. Thus, courts have not been willing to recognise a special licence for media outlets to go onto a person’s property to seek an interview and, at common law, courts have not been willing to recognise that an appeal to freedom of the press justifies providing journalists with a special privilege against disclosure of their confidential sources.
Court of Australia’s decision in Australian Broadcasting Corporation v O’Neill. In this case, a man imprisoned for life for the murder of a child wanted an injunction to stop the broadcast of a documentary which alleged that he was involved in several other unsolved child murders. He claimed this was defamatory of him. At first instance, in the Supreme Court of Tasmania, the trial judge granted an injunction, in significant part because, in his view, the documentary amounted to not merely ‘trial by media’, but suggested views about the role of the media and the nature of the behaviour in this case was highly relevant to the assessment of the balance of convenience — the test that would determine whether or not the injunction was granted — and contributed to different outcomes being reached. This is just one of many examples of how judicial perceptions of the media can contribute to influencing and affecting the outcomes of cases.

So, the argument is not that judicial perceptions of the media in each and every case informs or affects each and every decision made in an overt or a mechanical way. It is not that there is a straightforward causal relationship between the way in which judges think about or discuss media conduct and the outcomes of cases. There are cases in which a media outlet has escaped liability, even though the court has taken a dim view of the media outlet’s conduct. Judges and the media do not have to like one another. It is important for judges and the media to understand one another. The media play a vital role in keeping public institutions, including the courts, accountable. Courts rely on the media to inform and educate the public about what goes on in their courtrooms, but also, from time to time, to have to hold the media accountable for their actions. Courts and the media have a significant and interdependent relationship.

The goal of my research project is to contribute to an understanding that will enhance this relationship. The media can be characterised as a source of negative influence or merely a form of entertainment, committed to maximising profits through the pursuit of what is popular rather than what is in the public interest.

Sometimes, judges can view the media’s role in a more negative way. The media can be characterised as a source of negative influence or merely a form of entertainment, committed to maximising profits through the pursuit of what is popular rather than what is in the public interest. They can be a repository of power, trenching upon the rights of ordinary people, and the courts might need to intervene to protect those affected by the media’s misuse of their position. The media can also be viewed as setting themselves up as an alternative forum for dispute resolution — ‘the court of public opinion’ in which ‘trial by media’ occurs.

All of these various ways of perceiving the media and their roles manifest themselves in judgments and speeches given by judges. I am currently undertaking an Australian Research Council Discovery Project grant to analyse how judges perceive the media and how this informs and sometimes affects judicial reasoning in cases affecting the media. The project is a thematic analysis, exploring these various ways of viewing the media and their functions. Often, media law analyses issues in isolation, according to cause of action or subject area — such as defamation law or privacy law or contempt of court. My project attempts to map these differing views thematically, across areas of law and across causes of action, to see when and how these differing perceptions are relied upon and to see how they conflict with or complement each other or overlap. Often, media law adopts a localised approach, focusing on one jurisdiction, or a limited comparative approach, comparing and contrasting a few jurisdictions. My project attempts to map these views across a number of jurisdictions — Australia; New Zealand; the United Kingdom; Canada; the United States; and the European Union. The themes I have identified are not limited to any one jurisdiction. They all manifest themselves in slightly different ways, with slightly different emphasis, across all these jurisdictions. Often judges are dealing with similar legal issues in each of these jurisdictions, so I hope judicial perceptions of the media and their role inform and affect decision-making in one jurisdiction can provide insights for other jurisdictions.

So, how might judicial perceptions of the media inform and affect decision-making? My argument is that there are some cases which, while in principle open and given, open the nature of the decision to be made. A good example is the High Associate Professor David Ralph (BA 1997, LLB 1999, PhD (Law) 2003) is the author of two books and many book chapters and journal articles, on all aspects of media law. He has served on the editorial boards of the Media and Arts Law Review; The Communications Law Handbook; Co-author of the International Journal of the Samitie of Law; He is a regular columnist for the Legal and Media Watch. He is a consultant to the ALRC’s Collective Disputes Commission’s Review of the Federal Civil Disputes Resolution Framework. He is a regular columnist for the Legal and Media Watch. He is a consultant to the ALRC’s Collective Disputes Commission’s Review of the Federal Civil Disputes Resolution Framework.
 FREEDOM’S WHISPERERS: LAWYERS AND LIBERTY

Daniel Ward

Daniel Ward gave this speech at the 2013 Prize Giving Ceremony. At the ceremony, he accepted awards including the University Medal. This year, Daniel was the recipient of the Peter Cameron Scholarship.

There’s an old story that at the triumph of a victorious Roman general, a slave would accompany the general on his chariot. The slave would whisper, ‘Remember, you’re only a man.’ Here in the New Law Building, where the odd light fitting has been known to plummet unexpectedly from the ceiling, we don’t need any further reminders of our own mortality. (Although those of us starting careers at large commercial law firms maybe need a man whispering, ‘Remember, you’re only a slave.’)

I have to admit: sometimes at law school I’ve felt like I needed a whispering slave — not to remind me I’m human (because if the flying light fittings didn’t do that then the Real Property exam certainly did!), but rather to remind me what I’m doing here. Why do we put ourselves through law school? Why do we voluntarily submit to an experience that, as my premature grey hairs attest, can be a harrowing ordeal?

There’s perhaps no better person to ask than Professor Peter Gerangelos, whose constitutional law lectures were some of the most thought-provoking of my time here. I remember one class in which Professor Gerangelos waxed lyrical about Chief Justice John Marshall of the United States. ‘You see, ladies and gentlemen,’ he said, ‘everybody remembers the Mozarts and the Michelangelos, but the great jurists like Marshall are the unsung heroes — they build the legal basis for societies where the Mozarts and Michelangelos can flourish.’

Is that why we come to law school? Is that why we struggle to master topics with exotic names like ‘profits à prendre’ and ‘High Trees estoppel’?

If lawyers are around to build societies in which great art can flourish, then their record is patchy. Much of the finest creativity of the last century, for example, came about in spite of, or perhaps because of, the perversion of law. That’s certainly true of the great Russian composer, Dmitri Shostakovich. He lived in fear of the midnight knock on the door and the show trial presided over by Soviet lawyers (or pseudo-lawyers). But it’s fair to say that Shostakovich’s agony spawned some pretty stunning music.

Meanwhile, Chief Justice Marshall’s opinions laid the legal foundation for a society that gave us Paris Hilton and Kim Kardashian. So much for ‘high art’.

But here’s where I think Professor Gerangelos had it dead right: lawyers should be at the forefront of the enduring effort to preserve the freedoms and the rights that allow us all to flourish as human beings. And for me, that is a pretty good reason to persevere through law school.

I wonder how we, as Australian lawyers, will handle this immense responsibility. Last year I was lucky enough to go on exchange to NYU Law School. Another student there at the time was Chen Guangcheng, a blind, self-taught lawyer and political dissident from China. You may recall how his stint in the US Embassy in Beijing caused a major diplomatic incident last year.

NYU law professor Jerome Cohen helped broker a deal that allowed Chen to travel to the United States. Cohen interviewed Chen before a packed hall of NYU students, and encouraged us to ask questions. There was one particular
moment that I’ll not soon forget. Against the backdrop of a row of star-spangled banners, Professor al-Bishr leaned forward and said, ‘Everybody should feel free to speak up. I include our other Chinese colleagues!’ At NYU, you’re free to speak!’ And at this point, the righteous indignation in Cohen’s voice became palpable. ‘It’s one thing,’ he said, ‘for the Chinese authorities to stifle expression in their own country. But what is truly objectionable is when they try to extend that to this country, when they try to prevent people enjoying the freedoms of this country. That’s where the line really has to be drawn.’

To my mind, this was the American legal profession at its best: jealously guarding the liberties bequeathed by the Founding Fathers and the English common law. I wonder how we will measure up when it comes to defending our liberties. Those of us who’ve been through the clerkship application pantomime know how, at law firm cocktail evenings, you begin desperately groping for ways to start conversations. To paraphrase the title of one first-hand account of the Osama Bin Laden conversations. To paraphrase the title of one clerkship application pantomime know that the legal profession at its best: jealously guarding the liberties bequeathed by the Founding Fathers and the English common law. I wonder how we will measure up when it comes to defending our liberties. Those of us who’ve been through the clerkship application pantomime know how, at law firm cocktail evenings, you begin desperately groping for ways to start conversations. To paraphrase the title of one first-hand account of the Osama Bin Laden conversations.

In my Woody Allen-like social panic of why I would ask the (admittedly quite private) question of what the great British jurist Albert Venn Dicey labelled ‘the rule of law’. My concern is that, as a lawyer — a group of people peculiarly entrusted with the safeguard of our liberal traditions — will be blinded. Blinded by the dazzling array of commercial opportunities that a growing China presents: ‘As long as they want to make money, they’re fine to do business with.’ For what it’s worth, I think the danger is that we’ll get comfortable with authoritarianism. There’s a risk that we’ll subconsciously make a thousand tiny concessions to the state, and not to insinuate itself into our psyche. We might come to tolerate affronts to the rule of law. In short, commercial opportunities threaten to hypnotise us, turning us into well-meaning Manchurian Candidates.

My grandfather had been the last person in my family to begin a law degree. He didn’t finish it, and not because William Gummow failed him in Equity. It’s because as a student in Czechoslovakia, he’d been a vocal participant in anti-communist protests. When the communists took over in 1948, the writing was on the wall. He didn’t want to be lined up against that wall. He quit law school — then he quit the country. I wonder how we would react if the writing were on the wall like that here. Would we quit? Or would we perhaps accommodate ourselves to these threats, whether in this country or elsewhere? And if there’s one thing we’re good at, it’s mental gymnastics.

But maybe there are reasons to be optimistic. There is, after all, a lot of fervent talk at law school about human rights. Many students and academics are acutely aware of threats to these rights, whether in this country or elsewhere. Yet for a student like me, there’s a lot less discussion of more pedestrian matters like our rights here in this very institution.

In 2010, the University of Sydney Lawyers should be at the forefront of the enduring effort to preserve the freedoms and the rights that allow us all to flourish as human beings.

In particular, I worry about the impacts of our expanded dealings with the Middle Kingdom, a state without even a semblance of what the great British jurist Albert Venn Dicey labelled ‘the rule of law’. My concern is that, as a lawyer — a group of people peculiarly entrusted with the safeguard of our liberal traditions — will be blinded. Blinded by the dazzling array of commercial opportunities that a growing China presents: ‘As long as they want to make money, they’re fine to do business with.’

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In 2010, the University of Sydney
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freedom is a big word — big, beautiful and contested. We now have a Freedom Commissioner sitting on the Australian Law Reform Commission and an Attorney-General dedicated, he says, to finding and fixing any Commonwealth law that tramples on ‘traditional’ freedoms. But what Attorney-General Senator Brandis means by ‘freedom’ is still rather opaque. He did not champion the right of the Aboriginal refugees, who had been left with nothing but their boat when being towed back to Indonesia. Nor did free speech triumph when the Sydney Bilemore, under pressure from artists, declined funding from Transfield Holdings because it was earned, in part, by running immigration detention centres out in the Pacific. Brandis has directed the Australia Council to punish, with funding out in the Pacific. Brandis has directed the Human Rights Commission to ‘superintend it. But if we’re to have a Human Rights Commission it’s got to respect all human rights.’

This is where the rivalry of cry for freedom is being raised by the Coalition. On the contested ground between traditional assumptions of liberty and the protection offered in today’s world to women, blacks, gays, the disabled etc. Always good at identifying the villain, The Australian blames the ‘right-seeking political Left, which chooses the freedoms it likes and the boutique groups it believes should be protected’ (19 December 2013).

Religion and race are at the heart of a conservative campaign to wind back individual protection in the name of freedom. It’s a particular freedom to express as you could in the old days — publicly and without sanction — your views on human relations where such discrimination is ‘necessary to avoid injury to the religious sensitivities of people of the religion’.

Such provisions have offered little effective protection in the past, but here, a majority led by the Court’s President, Chris Maxwell, drew a distinction between the beliefs of the Brethren and the public opinion on others. The judges asked: was it ‘necessary’ in the terms of Victoria’s Equal Opportunity Act 1995 for the manager, Mark Rowe, to ‘knock back the booking’?

Maxwell P recognised the Brethren’s ban on all sex outside marriage was a ‘rule of private morality, adherence to which is no doubt of great importance to Mr Rowe and members of the Christian Brethren. But it carried with it no obligation to try to convince others to adopt the same views. Less so to prevent other people expressing to each other the view that — contrary to Mr Rowe’s belief — sexual relations between same sex attracted persons was not immoral but was part of the normal range of human sexualities’ (at 130).

The Australian Christian Lobby has condemned the decision and a fine of $3,500 as an erosion of Christian liberty. Salt Shakers (a Christian ethics action group) called the decision ‘yet another example of the removal of free speech and freedom of action in our society ... Biblical Christianity was again left out in the cold!’ The NSW Council of Churches endorsed Pastor Peter Steven’s statement to CBC: ‘The two-week case that has been fought hard for seven years, drew in the International Commission of Jurists, provoked iconoclastic judgments, and is now heading to the High Court.’ A youth suicide prevention group tried, in 2007, ‘to hire a camping ground on Phillip Island to conduct a homophobia awareness workshop for same-sex attracted adolescents. The Brethren, who run the camp, the Christian Brethren Trust, was happy to host school groups, businesses and end-of-season needy for the Collingwood Football Club, it refused to take these gay kids because the Brethren holds that homosexuality is contrary to God’s teaching. At stake were exemptions offered by many states to religious bodies allowing them to discriminate against lesbians, homosexuals, remarried divorcees, adulterers etc, in essence entrenching an array of views on marriage where such discrimination is ‘necessary to avoid injury to the religious sensitivities of people of the religion’.

The Sydney Morning Herald has also condemned the decision.

The admitted facts are the gateway to recognition as an Aboriginal person.’

People and causes they have long despised. It’s early days. Faced with opposition from every corner of Australia, the government seems set to take a retreat on s 18C and D. We have yet to see how Brandis addresses the impetuses to liberty by the courts. Whatever party is in power in Canberra, Labour or the Coalition, Australia seems fated to remain the only democracy on earth without a national charter or bill of rights. Freedom means something different here. Something a little less. It’s in the language.

Wingara Mura – Bunga Barrabugu Strategy

Louise Boon-Kuo, Louisa Di Bartolomeo, Tanya Mitchell, Irene Baghoomians and Greg Tolhurst

Sydney Law School is building a community that respects and empowers Aboriginal and Torres Strait Islander cultures and perspectives, and supports Indigenous students. The Faculty has been working with students and staff to implement Wingara Mura – Bunga Barrabugu, the University of Sydney Aboriginal and Torres Strait Islander Integrated Strategy.

The strategy is framed around a commitment to rights, opportunity and capability, and not a discourse of disadvantage. These three principles form the foundation of Sydney Law School’s implementation plan.

Rights

The discourse of rights must, and does, adopt a bottom-up approach to decision-making, recognising the values of Aboriginal and Torres Strait Islander people and avoiding imposing alien values and choices. Aboriginal and Torres Strait Islander peoples and culture are unique, and Indigenous people have the right and freedom to be treated as equal and to be different, and to be respected as such. The strategy is therefore concerned with equal access to opportunities and capability to enjoy. We wish to promote the richness of social and cultural diversity.

We have forged a strong collaboration with a small but dedicated group of Indigenous and non-Indigenous students, and will be working with them on aspects of the strategy as we proceed. In a similar vein, our curriculum development seeks to embed aspects of cultural competence into the curriculum, in consultation with members of the Indigenous community.

Guiding principles for cultural competence

- Indigenous people should be actively involved in university governance and management.
- All graduates of Australian universities should be culturally competent.
- University research should be conducted in a culturally competent way that empowers Indigenous participation and encourages collaborations with Indigenous communities.
- Indigenous staffing will be increased at all appointment levels and, for academic staff, across a wider variety of academic fields.
- Universities will operate in partnership with their Indigenous communities and will help disseminate culturally competent practices to the wider community.

Cultural Competence

Developing the ‘cultural competence’ of every academic, professional staff member and student in the faculty is a key concept of the strategy. It encompasses older notions of cultural awareness and cultural safety, but is a broader idea designed to incorporate consciousness of culture and respect for cultural difference.1 One of the central purposes is to foster reconciliation. It is our responsibility to help staff and students learn about aspects of Indigenous culture and history, and to engender awareness that one’s own perspective is culturally constructed. We aim to create a culturally safe space where Indigenous students feel able to draw on their unique cultures and experiences to make a valuable and valued contribution to Law School life.

Sydney Law School has implemented a range of initiatives to promote cultural competence among students and staff, including hosting presentations by Lynette Riley, a Wajarri/Gamilaroi person who is a Senior Lecturer and Academic Leader from the Office of the Deputy Vice-Chancellor (Indigenous Strategy and Services). Participants in her workshops experience an Indigenous Kinship system and gain understanding of the impact of colonial history on Indigenous communities.

We are also preparing for the university-wide Wingara Mura Cultural Competence Curriculum Review. An expert will advise us on how we might embed cultural competence throughout our core, elective and postgraduate programs. Professional staff engaging with Indigenous students will receive additional training. In semester two, Sydney Law School will run the Wingara Mura Public Lecture Series, designed around the broad theme of cultural competence.

Opportunity

‘Opportunity’ is about fostering talent, commitment, passion and vision. The University has an important role in providing such opportunity to students; however, it recognises that Aboriginal and Torres Strait Islander students face unique hurdles. Pathways to university and into law must be reassessed to ensure there are no unfair barriers to entry.2 Sydney Law School is working with the Division of Humanities and Social Sciences to develop internal pathways into law and to develop external entry pathways and scholarship opportunities additional to those existing under the Cadgal Alternative Entry Program and the Breadwinners Program.

Sydney Law School is also involved in the University’s on-campus experience for Indigenous high school students. The Wingara Mura – Bunga Barrabugu Summer Program is designed to give Indigenous children a taste of university life.

One of the most pressing issues identified by our student body and concerned staff is the need to support our Indigenous students through their law studies. Numerous staff members have volunteered to tutor or mentor Indigenous students. We are currently seeking Indigenous members of the legal profession to act as mentors for students. We are also developing a dedicated section of the website, and are supporting students to create an Indigenous law students association, an initiative of one of our Indigenous students.

Capability

The strategy is concerned to maximise students’ capability while maintaining their individuality. Students must be able to have a life where being Aboriginal or Torres Strait Islander is not the cause of upset, fear, shame or disadvantage. Indigenous people must be free to define and do those things of value in their lives and in their communities.

The strategy envisions building a community, both within and beyond the University, where Aboriginal and Torres Strait Islander students and staff are able to:

- Enjoy Indigenous identity freely, safely, confidently, with pride, comfortably in a University community that is respectful of diversity and the freedom of others;
- Pursue academic interests, careers and contributions that are of intrinsic personal and academic pride, craft and purpose, free of limitations created by inequity, stereotyping and ignorance;
- Form, sustain and enjoy longstanding networks across diverse cultures and peoples that are of intrinsic and instrumental value;
- Confidently engage in and contribute to the life, commerce and the identity of Indigenous communities and broader society; where all students and staff are able to:
- Engage effectively, respectfully and productively in critical thinking and self-reflection about Aboriginal and Torres Strait Islander issues specifically, and diversity more broadly; and
- Research and use knowledge from Aboriginal and Torres Strait Islander sources and settings, ethically and effectively.

1. Instructor, The University of Sydney, 2010.
2. Institute of Law and Justice, 2010.
The 2014 Aboriginal and Torres Strait Islander Summer Program

In January, the campus was abuzz as 209 Aboriginal and Torres Strait Islander high school students followed in the footsteps of their predecessors and decided to make that vision a reality.

To encourage participation, a range of roles, and to the law. Building on our experience, it is important to note that the summer camps instil and reiterate the ‘Yes I can!’ message among participants, countering the potential disappointment. It is, then, particularly important that the summer camp instil and reiterate the ‘Yes I can!’ message among participants, countering the potential disappointment. It is, then, particularly important that the summer camps instil and reiterate the ‘Yes I can!’ message among participants, countering the potential disappointment.

Some high school teachers actively discouraged Indigenous students who are aiming for law school. Mr Robert W Kelly AC (LLB 1960, LLM 1969) has been active in a range of scientific, educational, government, legal and charitable associations. Ms Virginia Walker OAM (LLB 1992) has worked with the Sydney University DiBartolomeo and Tanya Mitchell Baghoomians, Louise Boon-Kuo, Louisa Welsh and the Creative Arts, Music, Natural Science, and Social Science.

The years 11 and 12 participants worked with the Sydney University Law Society (SULS) to facilitate the law element of the Program, which was divided into two streams: years 9 and 10, and years 11 and 12.

There were many legally-oriented high school students who are aiming for law school. Mr Robert W Kelly AC (BA LLB, 2014) has been active in a range of scientific, educational, government, legal and charitable associations. Ms Virginia Walker OAM (LLB 1992) has worked with the Sydney University Law Society (SULS) to facilitate the law element of the Program, which was divided into two streams: years 9 and 10, and years 11 and 12.

After one session, three bright-eyed students stood up, wanting to know how they could become detectives, or forensic psychologists or lawyers (yes, in that order)! — the CSJ franchise is to blame.

Many young Indigenous people in Australia grow up without any contact with university graduates or access to mentoring that supports academic preparedness. Indeed, during a recent visit to some low socioeconomic status schools in Western New South Wales, SULS discovered that some high school teachers actively discourage Indigenous students from aiming for university, to ‘protect students from potential disappointment’. It is, then, particularly important that the summer camps instil and reiterate the ‘Yes I can!’ message among participants, countering the potential disappointment.

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After one session, three bright-eyed students stood up, wanting to know how they could become detectives, or forensic psychologists or lawyers (yes, in that order)! — the CSJ franchise is to blame. Anonymous: Summer Program 2014.
Forthcoming Events

VC’S MORNING TEA
Thursday 21 August 2014, 10.30am
Great Hall, Quadrangle, University of Sydney
A special event for alumni who graduated prior to 1965, and their guests. A generous morning tea, entertainment and an address by the Vice-Chancellor and Principal, Dr Michael Spence. Cost of $25 per person for alumni, $30 for non-alumni. RSVP is essential: 02 9351 0429, alumni.rsvp@sydney.edu.au to register.

SHANGHAI ALUMNI RECEPTION
Saturday 10 October 2014, 7.00pm
Kerry Hotel, Shanghai
There is no fee for this event but registration is essential: +86 2 9306 9728, alumni.rsvp@sydney.edu.au to register.

CHALLIS BEQUEST SOCIETY ANNUAL LUNCH
Friday 10 October 2014, 12.00pm
Great Hall, Quadrangle, University of Sydney
We warmly invite members of the Challis Bequest Society to the 10th Annual Lunch, hosted by the Vice-Chancellor. Members are asked to contact Angela Topping to secure a seat for the event: 02 9351 8834, angela.topping@sydney.edu.au.

ALUMNI AWARDS PRESENTATION
Friday 17 October 2014, 4.00pm
Great Hall, Quadrangle, University of Sydney
The annual Alumni Awards recognise the outstanding achievements of our alumni. The awards are divided into two categories: alumni achievement awards for graduates already established in their careers; and graduate medals, recognising younger achievers who graduated or completed their degree requirements in the previous year. 95PVs are essential: 02 9351 0278 or alumni.rsvp@sydney.edu.au to register and for further details.

JULIUS STONE INSTITUTE SEMINAR SERIES
The Julius Stone Institute Seminar Series continues throughout 2014, with seminars taking place at Sydney Law School in semester two. Registration is free but 95PVs are essential. Contact the Professional Learning and Community Engagement team on 02 9351 0429, law.events@sydney.edu.au.

Thursday 31 July 2014, 6.00pm
Dr Arlie Rason is a lecturer in legal philosophy at the University of Auckland Faculty of Law. His research interests include jurisprudence, political philosophy and hermeneutics.

Thursday 14 August 2014, 6.00pm
Associate Professor Massimo Giardinelli is a lecturer in the Department of Philosophy at the University of Warwick. He works primarily in legal and political philosophy and his main research interests are in the problems of authority, political obligation, International justice and the philosophical foundations of the criminal law.

Thursday 18 October 2014, 6.00pm
Professor Helen Irving (PhD 1987, LLB 2001) teaches Australian, comparative, and United States constitutional law at the Sydney Law School. She has researched and written on the making of the Australian Constitution; comparative constitutional design and gender; the role of history in constitutional interpretation; and the ‘dialogue’ model of judicial review. Her current major research, supported by a four-year ARC Discovery Grant, is on the history of constitutional citizenship and gender.

SYDNEY LAW SCHOOL’S DISTINGUISHED SPEAKER PROGRAM
Each talk will be held at the New Law Building, University of Sydney, and followed by a cocktail reception. Registration is essential, full fee $15, Sydney Law School Alumni $10. To register, contact the Professional Learning and Community Engagement team on 02 9351 0429, law.events@sydney.edu.au.

Wednesday 24 September 2014, 6.00pm
Free Trade Agreements and Consumer Protection, presented by Luke Hofstede, Professor of International Law, Research Fellow, Sydney Law School.

Wednesday 23 October 2014, 6.00pm

Thursday 20 November 2014, 6.00pm
Criminal Responsibility, presented by Associate Professor Arlie Loughlin (BA 1998, LLB 2000), Research Fellow, Sydney Law School.

22ND ANNUAL LABOUR LAW CONFERENCE 2014 — LABOUR LAW IN PRACTICE 2014: THE BIG ISSUES
Monday 25 August 2014, 9.00am-6.00pm
Softfit Wentworth Sydney
Presenters will discuss the top cases and major issues facing labour law in 2014. Registration is essential, contact Stacey Young, 02 9351 0264, stacey.young@sydney.edu.au to register and for further details.

27TH AUSTRALIA AND NEW ZEALAND SOCIETY OF CRIMINOLOGY (ANZSOC) CONFERENCE 2014
Wednesday 1 – Friday 3 October 2014
Sydney Law School, New Law Building
The theme is ‘Testing the Edges: Challenging Criminology’. The program will include a wide range of plenary sessions, interactive workshops, presentations and seminars, shaped to enhance and inform around the theme. Registration is essential. Contact the conference coordinator: 02 9351 0249, law.events@sydney.edu.au.

AUSTRALIAN LABOUR LAW ASSOCIATION (ALLA), 7TH BIENNIAL CONFERENCE
Friday 14 November and Saturday 15 November 2014
Manly, Sydney
The theme is ‘Under the microscope: The Next Phase of Australian Labour Law’?
Registration is essential with early bird rates available before 26 September 2014. To register, contact the Professional Learning and Community Engagement team on 02 9351 0429, law.events@sydney.edu.au.

Event Details

ALUMNI AND STUDENT NEWS

Reunion: Class of ’69

Bob Austin

38 members of the ‘Class of ’69’ assembled for dinner in May, to celebrate the 45th anniversary of their graduation. Each dinner told the group a few brief highlights of their recent years. Favourite topics were, in descending order: grandchildren; children; spouses (especially, in some cases, the number); careers; and, in one case, the visit of a duck to the speaker’s office, supported by photographic evidence! The nature of the legal advice received by the duck was never specified. Strong emotions were supplemented by levity and the occasional beverage. In the words of Oliver Wendell Holmes: ‘Sweet is the scene where genial friendship plays the pleasing game of interchanging praise.’
Sydney Law School congratulates all prize winners:

Families, friends, fellow classmates, staff and donors joined recipients to celebrate their achievements and to hear University Medallist, Kathleen Heath (BEcSocSc 2011, LLB 2014) deliver her speech.

Prizes are possible through generous gifts from donors. Sydney Law School thanks them and is always appreciative of their support.

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2014 Sydney Law School Prize Giving Ceremony

In May, Sydney Law School celebrated academic and scholarly excellence at the annual Prize Giving Ceremony.
The Importance of Student Support

James Higgins

The Sydney University Law Society has a long and well-documented history of servicing the social needs of students at Sydney Law School. While this is important in forging the long-lasting connections that are the key to thriving both at university and in the profession, the reality is that SULS offers a great deal more.

In the face of alarming statistics about the disproportionately high rates of mental health issues among law students, student support across a broad range of issues has become the primary focus of the society. That a great number of students feel an, at times, overwhelming degree of pressure is as apparent as it is concerning. I firmly believe that this is at least partially the result of a very narrow idea of ‘success’ that exists among students at society. That a great number of students

In the face of alarming statistics about the disproportionately high rates of mental health issues among law students, student support across a broad range of issues has become the primary focus of the society.

It is not always apparent whether the pressure students experience is external or self-inflicted. Regardless, it is certainly systemic — and not just at Sydney, but in all law schools. Narrowly focusing on academic performance in order to land a position in a top-tier law firm is not only unrealistic, but also misguided in the current legal market. There exists a host of different ends to which students can utilise their law degree. SULS’ role is to make these options real for students. We do this through hosting a near-countless number of presentations throughout the year, covering careers in the public, corporate and non-profit sectors. Indeed, SULS is the only organisation on campus that provides careers-related information to law students in any structured way. Similarly, we seek to build students’ legal and advocacy skills through our competitions and volunteering programs. As well as getting them out of the library, initiatives such as the SULS Juvenile Justice Mentoring Scheme are important in exposing students to different perspectives and life experiences.

My hope for Sydney Law School is that both students and staff feel a strong sense of community here. Despite the noise about the changing legal market and huge structural challenges in the university sector, the members of our community should not feel isolated or disempowered. There is a great deal to be achieved by working together, so that students’ time here is happy, productive and rewarding.
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