

Medallist's Address

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Dean, Professor Gillian Triggs, members of Faculty, donors of prizes, prize winners, parents, ladies and gentlemen.

During my first year of law school, I found myself on the stage of the old footbridge theatre in a Law Revue skit. The directors had cast me as the criminal defendant in a murder trial.

My lawyer was Michel Foucault.

‘Mr Foucault’, said the Judge, ‘you may open the defendant’s case’.

It was the French philosopher’s version of Ceasar’s ‘veni, vidi, vici’. Foucault stood. Foucault thought. And in an act of intellectual generosity, eventually Foucault spoke:

‘What – is – law?’

Foucault sat.

In that moment I became acutely aware of why the answer ‘42’ in Douglas Adams' *Hitchhiker's Guide to the Galaxy* is so overwhelmingly bathetic.

But in that law revue skit there was something more than bathos at play. The onstage Foucault was getting at something else, and he almost got it right. A bit like the real Foucault’s Panopticon – French philosophy's equivalent to John Rawls' 'veil of ignorance' and the 'Original Position'. If we accept the pretensions inherent in these fictional

devices, discipline and the application of law may be reducible to a 'political anatomy of detail'.¹

But I am reminded here of Coleridge: this version of law requires something like poetry: the 'willing suspension of disbelief'.² This is why I say that the question 'what is law' only almost gets it right. It too relies on pretensions and suspensions. The question 'what is law' assumes as its premise that the question of law is best limited to what 'is'.

Ladies and Gentleman, the most valuable part of my six years at the University of Sydney was receiving an education that gave asymptotic potential to legal inquiry. An education which taught me to ask not what is, or was, the law, but what *could* it be.

I want to use this question as my focus as I chart through my experiences while a student at this university. In the end, I think that this question of 'what could the law be', becomes another way of articulating that justice is ultimately, and must be taught as, a relational concept.

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Let me begin with law and politics.

When I started Law School in 2002 as part of a combined Arts/Law degree, the name of a Norwegian container ship was still only a recent addition to Australia's political lexicon. The Full Federal Court's decision in *Ruddock v Vardalis*³ was on the curriculum. The multi-award winning journalist, host of Media Watch and Sydney alumna, David Marr, was one of our first guest-speakers. I remember there were not enough seats in the Main Quadrangle lecture theatre that day. I was sitting in the stairwell. And I still remember the disgust in Marr's voice as he catalogued the lengths to which the Howard government had gone to make legal what offends human decency.

Four years later, in another university lecture theatre, I sat in an Administrative Law class discussing the High Court's infamous decision of *Al-Kateb v Godwin*.⁴ A stateless Palestinian refugee, Ahmed Al-Kateb, sought to end his detention in Baxter detention centre by requesting he be removed from Australia. The Immigration Department refused because no country would take him. The question to the High Court then was

¹ Michel Foucault, *Discipline and Punish* (transl. Sheridan, A.) (New York: Penguin Books, 1977) at 139.

² Samuel Coleridge, *Bibliographia Literaria* (1817)

³ (2001) 110 FCR 491.

⁴ (2004) 219 CLR 562.

whether this constituted indefinite detention, and if so, was it legal. In separate judgments a majority of the High Court held that it was. Their Honours found that the Migration Act authorised and required the detention of Mr Al-Kateb even if his removal from Australia was not, in legalese, 'reasonably practicable' in the 'foreseeable future'.⁵ In plain English it makes possible immigration detention for the term of one's natural life. It's a difficult case. It says much about what the law is. It speaks volumes about what the law could not be.

The point, I think, is this: determining whether conduct is 'legal' is, depending on the facts, either a more or less difficult analytical task. It can be demanding. In that case it was 'tragic'.⁶ It is undoubtedly crucial. But it is only one part of the political and social matrix within which these events bear significance. The student equivalent is skimming a case in one of those thick, brightly coloured books of neatly edited law materials and never asking what happened to the life at issue.

What happened to Ahmed Al-Kateb? I unexpectedly came across a piece in the *Sydney Morning Herald* late last year (incidentally a piece written by David Marr), which explained what happened to this man 'who made legal history as the man who couldn't get away'.⁷ Al-Kateb in fact never returned to detention following the High Court's decision. Late last year he was finally granted a humanitarian visa by then Immigration Minister, Kevin Andrews. Describing what it felt like to sit in the High Court during the judicial equivalent of a Friday Night on-field brawl, Al-Kateb hit the point: 'The High Court! I mean, I was worried. I wasn't sure they think there is a human sitting here. It's his life.'

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Reflecting on this relational dynamic of law and politics, I am acutely aware that I am indebted to the quality of the teachers this law school, and indeed university, possess. It is they who equipped me to question what law could be.

I was taught by teachers with a commitment to offering an education of expansive possibilities. Teachers who not only sought to impart their knowledge, but to teach students why it mattered. I am certainly speaking about my law lecturers – many of whom are here. I am also speaking of the teachers I had for English, linguistics, and

⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562 (per McHugh, Hayne, Callinan and Heydon JJ; Gleeson CJ, Gummow and Kirby JJ dissenting).

⁶ *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581 (McHugh J).

⁷ David Marr, 'Escape from a life in Limbo', *The Sydney Morning Herald* (27 October 2007).

politics. To those teachers I had, I say thank you. I do not single you out further because without exception, it was a privilege to be in each of your classes.

It was a privilege also, to be at a university where the quality of that teaching was a direct reflection of its leadership. I mention two people in particular. The remarkable Professor Ron McCallum AO who was Dean of this Faculty until late last year. Secondly, the late Hon. Kim Santow AO who was Chancellor for all my student years. Justice Santow was a giant of intelligence and humility in equal proportions. In both his personal and official capacities, he had a profound effect on my education. He showed what could be done. We are all so much poorer for his passing.

Of many lasting contributions Justice Santow left behind, one was his commitment to ensuring that this university stood for providing students with a breadth of education. Like so many, I was a privileged beneficiary of his ethos.

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I want to turn now to the breadth of that education.

I didn't really have a consistent logic to what I did in my spare time. On one occasion it was because of a somewhat violent reaction to the summer clerkship presentation of a Senior Partner of one of Australia's largest law firms, which labeled me – and every other penultimate student there for the free lunch – an 'insecure overachiever'. Apparently that's why we were studying law. It was also why, so he told us, we'd make excellent M&A lawyers because we'd never go home.

I laughed then and I'm still laughing now, but I walked out of the presentation wanting confirmation that idealism wasn't just for students. I walked into the Australian Law Reform Commission. A place staffed with a team of superb intelligence and character, I found there an engagement with law that was creative, dynamic, pragmatic. As a student volunteer on the inquiry into the Privacy Act 1988 (Cth) I learnt what it really means to question what could the law be. It was liberating. Enriching. It cemented so much of what I had learned at law school. It also, went far, far beyond it.

My time at the ALRC was an introduction to the law's potential to be socially contingent and personal. What really culminated my understanding of just how personal law can be was the experience I had more recently working for the Aboriginal Legal Service in the Northern Territory.

In part it all came about because, when editing the Sydney University Law Review (the journal, not the performance), I wrote about the constitutional validity of the Federal Government's intervention in the Northern Territory⁸ and the most recent stolen generation case, *Trevorrow v State of South Australia*.⁹ I was analysing the law. It was fascinating. It was also insufficient. I wanted to experience the cultural background to which it all applied.

Working for three months for the North Australian Aboriginal Justice Agency (NAAJA) I got that experience. There was much about bush court in remote parts of the Top End in wet season, of Darwin, of legal aid that challenged to the core what I had learned at law school. The most challenging was working on the criminal trial of a 21 year old young man, Damien.

The gist of the case was that our client, the 21 year old Damien, walked up behind a white guy and, for really no reason at all other than the whims of an intoxicated mind, king-hit the white guy from behind. The guy fell to the ground. At some point that night he also ruptured his spleen. Ruptured so badly it had to be removed. He'll be on drugs for the rest of his life.

Damien admitted he'd king-hit the guy and would plead guilty to the charge of assault causing bodily harm. Damien disputed though that his punch to the head, and not some subsequent altercation the victim, but not Damien, had been involved in, had been the cause of the splenic injury. The trial was a trial in causation. During hearings I sat with Damien's fiancée, his family and friends in the public gallery. I got to know them as people. Real people who had a reason to be proud of who they are and the person they were there to support.

It was a privilege to work on the case. But it wasn't a fairytale. At the end of the trial twelve white jurors found Damien guilty. That's a lot of people to all believe in guilt. Looking back on it, I don't know whether Damien, or someone else, caused the ruptured spleen. I'm not saying it was a case where I think an innocent man was wrongly convicted. I'm saying that this case just made me feel that what legally mattered missed the point.

For so many reasons I don't believe the case made wrong right. It did make Damien one of the one in 23 aboriginal adult men imprisoned in the NT on any one day of the year.

⁸ *Northern Territory National Emergency Response Act 2007* (Cth).

⁹ *Trevorrow v State of South Australia (No 5)* [2007] SASC 285.

An impersonal, statistical outcome for a case that taught me what law feels like when it's law as a personal, *really* personal noun.

Not only did Damien's case make law personal, it made me realise how achievements, like law, are relational.

Just before the jury were summoned to hear the Judge's final address, we had a *voir dire* (a proceeding during a criminal trial but held in the absence of the jury in order to determine a point of law). It was on a technical point of evidence crucial to the defence. Working on that submission was demanding, high-pressure and exhilarating. The Judge accepted the defence's submission. It felt, naively, like a victory. We won the legal argument. Less than eight hours later we lost the factual one which was the only one that mattered.

I tell the story because those of you sitting here today as prize-winners and scholarship recipients are equipped with the best legal minds of students anywhere in the country. When all you have to do to achieve for five years at law school (or three years of graduate school) is identify the right legal arguments to a given set of facts, it's easy to lose sight of the fact that ultimately 'achievement' is relational to the context in which you define it. It too is bound up with pretensions and suspensions.

That's why I keep coming back to this sentiment of asking not just what the law is, but what could it be. Seek out the opportunities outside of this faculty which will expose you to people, to ideas, to skills which supplement what will otherwise be only a narrow legal education. Do a summer clerkship – you have the privilege of working with brilliant lawyers at the cutting edge of the corporate sector. But seek out too other opportunities that are not well-advertised, not conventional, perhaps ones that won't even exist unless you make them happen. They will often be unpaid. They are always rewarding.

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I think opportunities like the ALRC and NAAJA – experiences in an education outside of the classroom - will become even more important for the students coming after me. That's a result of increasingly inadequate teaching resources.

When I was on the Jessup Moot team, I had the privilege of small-group learning within this Faculty. It is not substitutable for big lectures with an audience full of laptops. Granted, international law is slightly unique in that it is, in a sense, all about asking what

the law could be. But I believe my team won in Washington because – aside from having my four delightful and naturally brilliant teammates on it (one of whom, Zelig Wood, also won the University medal) – we had all had an education which gave us opportunities to explore, discuss and air our views.

My biggest disappointment at law school was the experience I had while representing students on the Faculty Board. Last year a majority of that Faculty Board voted to decrease a full-time undergraduate teaching load from eight hours per week during the thirteen weeks of semester, to just six hours of face-to-face teaching. For students that meant a decrease in one quarter of their teaching resources. It was a decision made with no extra money being on the table to pay for more teachers. The net result is higher class numbers. An advertised average of seventy per class.

As I said before, the quality and commitment of the teachers at this Faculty is exceptional. My experience in Washington for the Jessup moot taught me that it is quality unrivalled internationally. However as I leave this law school I remain convinced, that a brilliant lecturer engaging with a class of thirty students or less is a very different experience to the same lecturer talking to more than seventy.

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If I am right that these changes in the structure of ‘formal’ legal education will mean that outside of class-room experiences are to become even more significant in supplementing students’ academic learning, I think we are lucky then that this Faculty is linked to a profession of generosity and contribution.

Much of that profession is represented here today either personally by donors or in the names of prizes on the list awarded today. I am indebted to many in the profession who through prizes, sponsorship, or scholarships funded my education in its expansive sense.

I am also indebted to the generosity of others – from first year alumnae to High Court judges who contributed so generously with their time and energy to the student experience offered by this law school.

Let me conclude then on this point of contribution. To acknowledge the diversity of other people I haven't yet mentioned but who have given me the education which means I stand here today giving this address.

First, my parents. Neither of whom are lawyers. Both of whom schooled me in why the power of education is the power of possibility. I stand here because of you.

Second, the students with whom I shared my university years. Years of laughter, of friendship, of contribution and inspiration made possible because of the calibre of students this university has.

Third, my co-medallists, Zelig Wood and Tom Prince, and fellow prize-winners. To you I offer my congratulations. To you also I make my final remarks.

There's a book edited by Dr Bernadette Brennan which was the focus of a Sydney Writer's Festival event this morning. It's called *Just Words? Australian Authors Writing for Justice* (2007). In it, there's a breathtaking analysis by the late Dr Noel Rowe on the poetics of justice. Analysing the stolen generation poetry of the writers Eva Johnson, Rosemary Dobson, Judith Wright and Francis Webb, Noel shows how justice is relational. At one point he says:

To say justice is likely to be inadequate ... is not to say that it cannot still be possible and authentic.¹⁰

In fewer words, Noel articulates precisely what I learnt in six years. To believe there's a value in questioning not just what is law or justice and stopping there, but to seek to make possible and authentic what could be.

I wish you all the best for the rest of your university education and beyond.

¹⁰ Noel Rowe, 'Just Poetry' in Bernadette Brennan (ed), *Just Words? Australian Authors Writing for Justice* (2007) at 54-5.