**ABA CONFERENCE - BOSTON**
**WELCOME ADDRESS**[*]

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At the outset may I presume, on behalf of all of us, to congratulate the ABA on arranging for us to meet in these magnificent venues, and for organising such pre-eminent members of our profession to address us on the vital questions of its survival.

It is a great privilege to have the opportunity to welcome you to the Boston leg of the Conference, and especially to do so in this grand library dedicated to the memory of President Kennedy, whose great-grandfather was, like the ancestors of many in this city, and indeed in this room, an Irish immigrant for whom emigration from that "most distressful country" (as the old song[1] had it) was a matter of survival in the most basic sense.

It must be rare in human history that the laws and the government of a country so catastrophically failed to secure the peace and welfare of a people. Patrick Joseph Lee, an Irish immigrant arriving at the Boston docks in 1893, spoke for these people when he looked around him, and exclaimed: "If there's a government here, I'm agin it."[2]

America welcomed these desperate and despondent people; and became a stronger and better country as a result. John Kennedy, born and brought up in Boston a generation after Patrick Lee's arrival, loved the Commonwealth of Massachusetts, and its idea of free government. He was constant in his admiration for the historic role of Massachusetts as the leader of the American colonies in their struggle for independent nationhood, and as the exemplar of the best in American democracy thereafter.

In his famous "City upon a hill" address to the Massachusetts State Legislature on 9 January 1961, 11 days before his inauguration as President of the United States, Kennedy said: "For what Pericles said of the Athenians has long been true of this Commonwealth: 'We do not imitate the laws and constitutions of others, but provide a model for them to follow.'"

JFK knew his Thucydides well. In the typed draft of this speech, which is kept in this library, only the beginning and end words of the quotation from the speech that Thucydides attributes to Pericles appear. Plainly, JFK knew the quote by heart.

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[*] Welcome Address to the 2015 Australian Bar Association Conference, Boston, Massachussets, USA, 7 July 2015.
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[1] "The Wearing of the Green". The first verse is as follows:

> "Oh, I met with Napper Tandy and he took me by the hand
> And said: 'How's dear old Ireland and how does she stand?'
> 'She's the most distressful country that you have ever seen
> For they're hanging men and women there for the Wearing of the Green.'"

[2] R E Lee, "In the Public Interest: The Life of Robert Emmett Lee from the FBI to the FCC", (1996) *University Press of America* at 3.

JFK, given his contribution in the mordant, silver-veined English prose that is characteristic of the best of American public speech, is an appropriate source of inspiration for a conference whose theme is the survival of great ideas in hostile environments.

The great idea we are particularly concerned with is the independent Bar, but we can do no better than to follow Kennedy in recognising that a discussion of the survival of great ideas should begin with the Athenians.

**The Athenians**

The Athenian, Aeschylus, was the Western World's first great dramatist. There were, perhaps, great tragedians before him, but he was the first whose work was so exceptional that sufficient copies were made for his work to survive. He deserves a special place in the story of democracy as a form of government and in the affection of our profession.

For he was a most interesting man. Notwithstanding the many honours and prizes which he won from the Athenians for his dramatic works, the achievement of which he was most proud was his participation as a soldier in the Athenian victory over the Persians at Marathon in 490 BC. We know this from his own epitaph.

At Marathon, he, and perhaps as many as 22,000, perhaps as few as 8,000, of his fellow citizen soldiers, prevented the invasion and destruction of Athens by the mercenary armies of Darius the Great.

The remarkable thing about the battle of Marathon is that it was the first fought by a democracy against an existential threat, and after the survival of the democracy in this battle, nothing would be the same again. John Stuart Mill said: "The battle of Marathon, even as an event in English history, is more important than the battle of Hastings. If the issue of that day had been different, the Britons and Saxons might still have been wandering in the woods"[3].

The Athenian democracy was only two decades old, but it was a fully-fledged democracy nonetheless. We know that was the case because, before Marathon, Athenian aristocrats who died in battle were commemorated by life-size stone statues and boastful verses celebrating their individual prowess as warriors. After Marathon, each Athenian who died in the battle was mentioned on a stone slab only by his given name and his membership of one of the 10 Athenian tribes: there was no way of telling whether they were aristocrats or artisans or peasants; the class divisions which characterised the period of the Peisistratid tyranny had lost their legal force and, it would seem, much of their social cachet.

Aeschylus was deeply committed to the nascent Athenian democracy. He defended it on the field of battle and he mused upon its nature in his plays. His greatest plays were the trilogy known as the *Oresteia*[4].

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[3] John Stuart Mill, *The Collected Works of John Stuart Mill*, (1978), vol 11 at 273.

[4] Katrin Trüstedt, "The Tragedy of Law in Shakespearean Romance, (2007) 1(2) *Law and Humanities* 167-182.

The first two parts of the *Oresteia* touch upon the futility of violence and revenge of an heroic or aristocratic age, that is, the age when a small number of armed men dominated primitive farming communities.

In the first play, Agamemnon sacrificed his daughter Iphigenia to the gods to ensure fair winds before sailing to Troy. In the second part, Agamemnon's wife, Clytemnestra, Iphigenia's mother, murdered Agamemnon in his bath on his return from Troy. Orestes, in conformity with the requirements of filial piety, killed Clytemnestra in revenge for Agamemnon's death. Clytemnestra's ghost, together with the Furies, demands Orestes' death in retaliation for the crime of matricide. In the third part of the trilogy, Orestes' makes the point that he was obliged by the natural claims of piety to avenge his father. How is the futility of the cycle of violence and vengeance to be avoided?

Hegel thought that the conflict in the *Oresteia* was at the very foundation of Western civilization: on one side, the Furies speaking for a primitive natural law of vendetta and blood feud which demands that the matricide be avenged; on the other side, Orestes and Apollo calling for 'justice' in human terms.

Both sides appeal to grey-eyed Athena to resolve the seemingly insoluble dilemma arising from the circumstance that each side's position was right in terms of the absolute claims of nature. Athena, the voice of wisdom, proposes the institution of trial by jury. And when the jury was tied, Athena broke the deadlock by introducing the solution of the onus of proof that reflected a distinct preference for mercy.

It has been said that "Aeschylus offers this unprecedented means of resolution as a founding emblem of Athens' moral and political ethos, the rule of communal law."[5] These "founding emblem[s]" operate through the citizens themselves[6].

For Aeschylus, the institution of trial by a jury of citizens was the mechanism whereby a democratic community could resolve, peacefully, dilemmas insoluble by aristocracy or tyranny, save by violence, which inevitably begot more violence, or by the theocratic manipulations of madmen or charlatans who claimed to speak for the gods. The participatory democracy of the jury meant that the primitive natural world of the blood feud and the rule that "might makes right" were left behind with tyranny, aristocracy and theocracy.

I have spent some time on Aeschylus and his fellow citizens because it was they who announced to the world the idea that doing justice is something that citizens must do for themselves as a community, rather than relying upon the resolution of conflict by force or fraud: the force of the tyrants or aristocrats who control access to weapons or the fraud of the theocrats who claim to speak for the gods.

But, as we know, the Athenian idea as to how that might be done in a democracy did not survive.

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[5] Christopher Collard, 'Introduction' in "Aeschylus' *Oresteia*" (Christopher Collard (ed)) (Oxford: Oxford University Press, 2002), p. xvi.

[6] Christopher Collard, 'Introduction' in "Aeschylus' *Oresteia*" (Christopher Collard (ed)) (Oxford: Oxford University Press, 2002), p. xvi.

Just as the executive and legislative functions of the Athenian polis were performed by the participation of the entire citizenry, so was the adjudicative function exercised through a jury of the entire citizenry. There were no judges appointed for their expertise or independence of the parties and their interests. And in classical Athens, the litigant had to speak for himself directly to his fellow citizens. Professional lawyers were not permitted the opportunity to befuddle the citizenry.

With the benefit of hindsight, it is not hard to see why the Athenian model of citizen adjudication in its purest form did not survive. Few people have the skill or training or objectivity to argue their own cause against their fellow citizens and especially against the community itself. Unpopular parties tend to lose because they are unpopular, regardless of the merits of the dispute viewed objectively. Just ask Socrates.

With our more individualistic perspective, we recognise the importance of the idea that justice in individual cases is something different from, and more important than, popular approval. The process of adjudication by the assembly of all citizens was not sufficiently rational to create or maintain confidence over time in the justice of that adjudication. There was not that differentiation of function between adjudication and legislation which is apt to achieve equal justice. As John Locke explained in his *Two Treatises of Government*[7]:

> "for the same Persons who have the power of making Laws, to have also in their hands the power to execute them … they may exempt themselves from Obedience to the Laws they made, and suit the Law, both in its making and execution, to their own private advantage."

As Jeremy Waldron has said, if the processes of making, adjudicating upon and enforcing laws are in the same set of hands, those hands may "direct the burden of the laws they make away from themselves."[8]

For us, the adjudicative function of the State came to be entrusted to the organised legal profession; and that story began in the Middle Ages.

**Medieval origins**

As you all know, the 800th anniversary of the signing of Magna Carta took place in June this year.

We have been hearing a lot about Magna Carta, most of it very enthusiastic. And that is fair enough because there can be no denying that Magna Carta was, in its way, an expression of the important idea that those who govern should themselves be under the law.

But we should be ready to take all that we hear with a grain of salt. In particular, we should not be beguiled by the complacent notion that Magna Carta was a manifestation of a peculiarly English genius for constitutional government.

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[7] Locke, *Two Treatises of Government*, Peter Laslett (ed), (1988) at 364.
[8] Waldron, "Separation of Powers In Thought and Practice?", (2013) 54 *Boston College Law Review* 433 at 446.

That having been said, there are two provisions of Magna Carta which are worth noticing in a discussion of the survival of the legal profession.

Chapter 45 promised that: "We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well."

Chapter 17, which provided that "Common pleas shall not follow our Court, but shall be held in some fixed place", greatly aided the founding of the profession and the securing of its role in the governance of the country.

In the long and disputed historical record of the common law, these provisions were the birth notice of the legal profession and of the judiciary as an arm of government.

The idea that the exercise of the judicial power of the state should be entrusted exclusively to those with an expert understanding of the law proven by professional training and experience, and imbued by that training and experience with a professional ethos of disinterested personal restraint, has been a central dynamic in the development of the common law since its very first moments of self-consciousness. It is **the** great idea that found expression in the Magna Carta; and it survived even though Ch 45 did not.

On 24 August 1215, at John's request, the ironically named Pope Innocent III declared Magna Carta void on the basis that it was "shameful, demeaning, unjust and obtained under duress".

Chapter 45 did not make it into the 1216 reissue of the Charter or the third edition sealed by Henry III in 1225. But the idea of an expert and independent legal profession had been unleashed and Ch 17, which was continued, meant that litigants and lawyers did not have to follow the King's progress around the country. That meant the Court of Common Pleas was separated from its King's direct influence. Moreover, it meant that the legal profession could concentrate in London, with the result that the Inns of Court were established[9].

At the time John signed Magna Carta, the judges had a great deal of direct personal contact with the King. We know this because they "often marked their cases 'loquendum cum rege'"[10], that is, "to be discussed with the king". The practice reflected the political reality that the judges were not then independent of the Executive government of the day; rather, they were directly dependent for their authority upon the monarch. Indeed, it seems that the practice of direct consultation with the King may have given rise, at least in part[11], to the grievance addressed by Ch 45 of Magna Carta.

Thereafter, the idea that the work of the lawyers, and of the judiciary from whose ranks they came, was a responsibility to be discharged by members of a learned profession independently of the monarch, developed apace. That development was so sufficiently assured by the end of the

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[9] Yale Lectures on English and American Laws and Jurisprudence, (1894) *Yale University Law Journal* 34 at 43.
[10] Turner, *The English Judiciary in the Age of Glanvill and Bracton*, (1985) at 159.
[11] It seems that cl 45 was also a response to grievances related to particularly egregious advisers of the King who happened to be French: McKechnie, *Magna Carta, A Commentary on the Great Charter of King John*, 2nd ed (1914).

14th Century that the rights of subjects were being vigorously and successfully enforced, even against the King himself in his own courts.

There was, for example, the celebrated litigation in the 15th Century between the Abbess of Syon, the head of a cloistered order of nuns, and Henry VI, which arose when the King dispossessed the abbey of an endowment given to it by his father, Henry V. The rights of the nuns were triumphantly vindicated by the independent judiciary assisted by equally independent lawyers.

Incidentally, the nuns did not forget. Henry VI's name was not mentioned again in the names of the eminent persons for whom the nuns prayed until 1937[12].

**Independent professionalism**

And so the legal profession developed in a way which was unique both amongst all the professions and to the common law tradition. It was a profession whose members were chosen to serve in the government of their community as officers of the judicial branch of government. This may be contrasted with the continental experience of career judges who spend their whole professional lives in government service. It was a profession whose members acted in the service of the community from whom they were drawn to ensure that everyone, including the government, abided by the law. And it was a profession in which both sides of the Bar table were expected to exhibit both special expertise and personal disinterest in the outcome of disputes.

It is not going too far to say that in the countries of the common law tradition, the judiciary, as the unelected third branch of government, has come to be accepted as an integral feature of our democracy because our judges are formed in a professional background of training and experience which inculcates both competence and independence in the administration of justice. These qualities in the judiciary are developed by experience within the legal profession, and then vouched for by their colleagues in the profession who know them better than anyone else.

The idea of independent professionalism as the ethos which informs the administration of our system of justice has become ever more securely established over the centuries. Edmund Burke captured this idea by speaking in favour of the "cold neutrality of an impartial judge"[13] over the idea of the exercise, by judicial proxy, of the popular will. Burke's idea of cold neutrality has its modern echoes in Sir Owen Dixon's notion of strict and complete legalism.

For Australians, the adjudicative function of the state is performed exclusively by judges appointed by the executive government. Our Constitution, as we have interpreted it, demands a strict separation of the judicial function from the other functions of government[14]. These arrangements are calculated to serve values of expertise and independence but not democratic participation. For some liberal commentators, such as Laurence Tribe: "The whole *point* of an independent judiciary is to be 'antidemocratic'"[15].

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[12] Makowski, *English Nuns and the Law in the Middle Ages: Cloistered Nuns and their Lawyers, 1293-1540*, (2012) at 85-86.

[13] Burke, *To His Constituents*, J P Brissot (trans) (1794) at iv.

[14] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

[15] Tribe, *Abortion: The Clash of Absolutes*, (1990) at 80.

In the United States the claims of popular democracy, asserted most vigorously during the presidency of Andrew Jackson, for a time seemed to trump the claims of politically independent professionalism, and led to the adoption of an elected judiciary in many of the States.

There is then some irony in the circumstance that the argument for tenured judges, appointed from the ranks of the legal profession, was made most eloquently by an American. Writing in No 78 of "The Federalist"[16], Alexander Hamilton observed:

> "[A] voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents … [which] demand long and laborious study to acquire a competent knowledge of them."

In Australia, no one has ever thought that an unelected judiciary is incompatible with government by the people. In particular, no one has ever sought to deny the force of Hamilton's argument by suggesting that the judiciary should be elected.

**Mutual dependence of Bench and Bar**

As a matter of history, it was the professional association of barristers and judges that originated in the Inns of Court, aided no doubt by the Reformation, which fixed the character of the common law and its processes as something quite different from the civil law system rooted in the academic treatment of Roman law and canon law.

The symbiotic relationship between the judiciary and the Bar, the organised mutual dependence of each side of the profession upon the other, became the characteristic dynamic of the common law system distinguishing it from developments in continental Europe[17].

In the development of the common law system, the judiciary and the Bar are mutually dependent as two sides of the same coin. Each side of the Bar table has a vital interest in the quality of the performance of the other. That mutual dependence can be illustrated by reference to some famous names.

Take, for example, Sir Edward Coke. In Coke's first case, his client, an orthodox Vicar of the Church of England, accused Lord Henry Cromwell, the grandson of Thomas Cromwell, of sedition by reason of Cromwell's puritanism. Cromwell sued Coke's client for damages under the

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[16] Hamilton, Madison and Jay, *The Federalist Papers*, (2003) at 470.

[17] As Gummow J explained in *Roxborough v Rothmans of Pall Mall Ltd* ((2001) 208 CLR 516 at 544 [72]), with us, theory does not "come first"; rather, our system of case law develops so that "over time, general principle is derived from judicial decisions upon particular instances." This mode of development of the law is one of the radical differences between the common law and continental theory.

ancient legislation which was intended to prevent people speaking ill of the aristocracy, the statute *Scandalum Magnatum*. Bowen relates that:

> "Coke … discovered a mistake in the written declaration of [Cromwell's] counsel – only one word, but it sufficed. The original act of *Scandalum Magnatum* had been, since its passage in 1378, translated from Latin into law French, then into English. Cromwell's lawyer, instead of referring to the original statute, had been content with a third-hand English version which rendered the French word *messoinges* (lies) as 'messages.' Translating this back into Latin, Coke's opponent wrote *nuncia* (Latin for *messages*), 'whereas' Coke told the court triumphantly, 'it should have been *mendacia* [lies].'"

Cromwell's case was thrown out, and Coke's reputation was made. That Coke's career took off on the basis of this piece of pettifogging pedantry says as much about the legal system of the time as it says about Coke's precocious talent.

One can further illustrate the point about mutual dependence by a brief look at the judicial work of two famous American judges, one an autodidact and the other an academic lawyer, both with political ambitions, who were not products of that professional training and experience.

**Black and Douglas**

Hugo Black and William O Douglas were very different in many ways. What they had in common was that neither of them had been a practicing lawyer by profession before his elevation to the Court.

Hugo Black was appointed to the US Supreme Court from the US Senate by Franklin Roosevelt. Black was to become famous as something of a liberal lion on the Court; there was some irony in this, given that he had originally been elected to the US Senate from the State of Alabama with the support of the Ku Klux Klan, of which he had been a member. He had almost no practical experience of legal practice. He certainly had no knowledge of federal law or its practice.

He alarmed his colleagues on the Supreme Court when he began his first dissenting opinion by expressing his belief that the impugned statute had not "been proved beyond all reasonable doubt to be in violation of the Federal Constitution"[18], that standard being applicable to proof of matters of fact rather than conclusions of law.

Black became the originator of originalism as a theory of constitutional construction. It was not Professor Robert Bork or Justice Antonin Scalia who invented originalism; it was Justice Black.

Black had no compunction in dispensing with the layers of interpretation which case law had added to US constitutional law. His approach was to give effect to the words of the Constitution as they originally meant. Professor Sanford Levinson, in his book *Constitutional Faith*[19],

[18] *Connecticut General Life Ins Co v Johnson* 303 US 77 at 83 (1938).
[19] Levinson, *Constitutional Faith*, (1988) at 31-33.

described Justice Black's approach as an expression of the Protestant idea that the Bible speaks to each individual who needs no priestly caste to interpret it[20].

It might also be what is to be expected from a self-confident autodidact whose self-confidence has not been corrected by the deflating experience of life at the Bar. However that may be, Justice Black's origination of originalism came in a lone dissenting judgment; it was to be developed by him over the years as his major contribution to the jurisprudence of the Supreme Court of the United States. It emerged unbidden by legal argument, and unheralded during the argument of the case.

As Justice Black developed the doctrine in later cases, it revealed unmistakable traces of the awkwardness of the inspired self-teacher. Thus, for example, while Justice Black believed that the First Amendment was an absolute guarantee of the freedom of speech, he took a literal view of "speech" so that a jacket which proclaimed: "Fuck the Draft" was not speech and so was not protected[21].

One would like to think that this narrow mechanistic approach would not survive a few minutes of argument in an Australian or New Zealand court.

At the other end of the spectrum of interpretational theory, the Living Constitution approach had an eccentric proponent in Black's colleague on the Supreme Court, William O Douglas. He had been an academic and a New Deal Administrator, but he had never practiced as a lawyer. He was an avowed member of the realist school of jurisprudence. His unapologetically results-driven approach was described by a scholar of the US judiciary[22] as that of an "anti-judge" by virtue of his "indifference to the approved sources of judicial constraint"[23].

In a dissenting judgment in *Poe v Ullman*[24], unbidden and unheralded, Justice Douglas first asserted the right to privacy that "emanates from the totality of the constitutional scheme under which we live". He built on this in the more famous case of *Griswold v Connecticut*[25] to say that "specific guarantees in the Bill of Rights have penumbras, formed by the emanations from those guarantees that help give them life and substance." It is fair to say that Justice Douglas felt the "vibe"; indeed, he was the First Apostle of the "vibe".

While one might not quarrel with the results in those cases, it has to be said that a results-driven judge, who justifies his or her decisions by indulging in the sort of poetic obscurantism that characterises theocracy, can do harm to the judicial institution and to the legal profession which serves it.

A results-driven approach is a repudiation of the common assumption about the ethical constraints on the judicial method that binds our Bench and Bar just as it bound them in the moots in the Inns

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[20] See *United States v Dennis* 341 US 494 at 550 (1950).
[21] *Cohen v California* 404 US 15 (1971).
[22] White, *The American judicial tradition: Profiles of leading American judges*, 2nd ed (1988) at 369.
[23] White, *The American judicial tradition: Profiles of leading American judges*, 2nd ed (1988) at 390.
[24] 367 US 497 at 521 (1961).
[25] 381 US 479 at 484 (1965).

of Court in the 14th Century. It is the self-disciplined professionalism of our Bar which, translated to the Bench, makes an unelected judiciary acceptable as the third branch of government in a democracy. The mutual dependence of Bench and Bar, and the professional training of our judges by years of experience at the Bar, give our judges the technical skill to do their work well, and they have a wholesome influence on our basic ethical understanding of the proper boundaries of the judicial function.

For an English or Australian or Canadian or New Zealand judge, disciplined by decades of practice at the Bar, the obvious problem of approaching the determination of a case as Douglas or Black did is that it is simply unprofessional.

In *Obergefell v Hodges*[26], Scalia J, whose legal background in common with most of his colleagues was in academia, attacked the majority opinion in the following terms: "The opinion is couched in a style that is as pretentious as its content is egotistic … [T]he opinion's showy profundities are often profoundly incoherent."

And in footnote 22, Scalia J tells us what he really thinks:

> "If, even as the price to be paid for a fifth vote, I ever joined in an opinion for the Court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity', I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."

Whatever view one may have of the outcome of the case, or of the divisions within the Court over the much-vexed question of judicial restraint on matters of constitutional substance and prose style, the circumstance that the professional experience and training of the highest US Justices can be productive of such flamboyant vituperation invites the comment that whatever it is that the Britons, Canadians, Australians and New Zealanders are doing to ensure our judges do not speak of each other in this way, we should keep on doing it. And whatever that is, it would seem to have something to do with the relative absence from our Bench of lawyers whose background is in academia rather than in the practicing profession.

**The challenges**

Professor Richard Susskind writes about the future of courts and lawyers; his books include *The End of Lawyers? Rethinking the Nature of Legal Services and Tomorrow's Lawyers: an introduction to your future*. He is also the IT adviser to the Lord Chief Justice of England and Wales. He sees the future for lawyers as a world of virtual courts, legal process outsourcing, and internet-based global legal businesses and online legal document production. The particular role of the Bar does not loom large in his vision. But Professor Susskind's work is useful because it serves to alert us to the two great challenges of commercialisation and bureaucratisation.

[26] 576 US ____ (2015) ("the Gay Marriage Case").

**Commercialisation**

There can be no doubt that the processes of commercialisation, and their deleterious effects upon the professionalism of the solicitors' branch of the profession are an existential threat to that branch of the profession; but their peril is the Bar's opportunity.

The uninhibited drive of large firms of solicitors for success in the market place for legal services by strategies of aggressive self-promotion can mean that those who make it their business aggressively to sell themselves to the public risk creating the perception that they are indeed for sale. It reminds one of what Napoleon said of Talleyrand, France's famously venal foreign minister: "He would sell his soul for sixpence; and he would be right to do so."

If, because of the way lawyers speak to the public, the community comes to perceive them as businessmen principally interested in self-promotion or the exploitation of opportunities for profit by turning clients' problems into cash flow for the benefit of shareholders, then the public will think of them as Napoleon thought of Talleyrand.

My own experience, and anecdotal evidence, suggests that there are serious problems with aspects of the modern model of the large (and ever-expanding) law firm. In many large firms, junior lawyers are not trained in the basic skills of a lawyer. Rather than being taught how to take a proof of evidence from a witness, they are chained to the process of discovery, the purpose of which they barely understand. Their skills as litigators either never develop or rapidly atrophy. It is this de-skilling that is occurring within some large scale practices and alternative dispute resolution which is one factor likely to ensure the Bar's survival.

Senior lawyers are kept, by this model as far as possible, from applying their skills and experience and the application of a critical lawyerly intelligence at the earliest stages of a legal problem; and then forced into retirement while still in their prime. Great skill and knowledge is either lost to the community or the senior lawyers find their ways to boutique firms for whom the independent Bar is a necessary condition of their survival.

The still common practice of time-costing by large firms rewards the inefficient and the lazy. It is difficult to believe that clients have put up with it for the last three decades, but it is impossible to believe that corporate clients who have real economic power will continue to put up with it in the future.

The Bar's business model of sole practice serves it well because it keeps the Bar relatively cheap, at least so long as barristers don't see their remuneration as a matter of charging what the market will bear.

And, most importantly, young lawyers, certainly the most able and committed of them, will find the excitement of the Bar more satisfying than a slow, albeit remunerative, death within the bureaucracy of a large law firm.

The young lawyer at the Bar has his or her fate in his or her own hands to a greater extent than the young lawyers in one of the larger law firms which today dominate the legal landscape: their fate

is very much at the mercy of the non-lawyers of the human resources department of those firms. That is a prospect which any young lawyer worth his or her salt would find repellent.

On the other hand, as Brennan CJ said to this Conference in 1996:

> "The Bar captures the mind and governs the life of those who join it. Its rewards are sometimes financially generous, sometimes financially parsimonious. It is a profession to be entered only by those who have a passionate desire to be a barrister. But that is the best of all reasons. For those, the experience of practice does not disappoint."

**Bureaucritisation**

It is not commercialisation but bureaucratisation – the view of litigation as a process in which advocacy in non-jury trials and appeals is all about processing written materials – which is the real threat to the survival of the Bench and Bar as we know them.

In Australia, after three decades of the growing predominance of written submissions, it is timely, I think, to remind ourselves of the abiding value of oral argument and the importance of the skills of oral advocacy.

The downgrading of oral argument means that the function of decision-making moves into the judges' chambers as part of the trend towards bureaucratisation of the administration of justice. A recent quantitative study of the writing styles of US Supreme Court decisions suggests that the influence of the justices' clerks is growing in that, across the Court, observable stylistic differences are decreasing, but that the stylistic differences in the output of individual justices is increasing[27]. And if the clerks are doing no more than rationalising the votes of their justices, the corrective discipline of oral argument becomes of less moment and the dangers of degeneration into bureaucracy become more serious.

What our judges and barristers do in open court is the antithesis of bureaucratic decision-making. It is an activity which is subject to pressures and disciplines that also do not operate upon academic lawyers or upon lawyers who do not appear in court to argue cases. These pressures have a wholesome effect on the quality of argument. The pressure of oral argument in open court introduces a level of discipline and a powerful sense of the relative merits of contending positions. It also ensures transparency in the process of decision-making. And it allows the citizenry direct insight into the public drama of our life as a community. This sense of the public drama is an antidote to alienation and anomie.

The skills of refinement, simplification and synthesis that we value most highly in our advocates have been developed over a millennium in oral argument in court or in moots that began in the Inns of Court, rather than in the marshalling of citations from academic treatises. That is no less true today than it was in the time of Edward I.

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[27] Carlson, Livermore and Rockmore, "A Quantitative Analysis of Writing Style on the US Supreme Court", March 11 2015, Forthcoming *Washington University Law Review* 93:6 (2016).

In my visits to a number of appellate courts in the United States I have noticed that advocates often seem indifferent to the opportunities to persuade presented by oral argument. That is, presumably, due to the perception of the legal profession here that cases are won or lost on appeal by the strength of the written brief, and that oral argument is of little moment.

This perception is not universal; and it is readily apparent that the judges here are eager to interrogate the advocates about the issues on which the decision of the case would be likely to turn. But the advocates themselves often seem unwilling to engage in the debate.

When judges throw out questions indicating how they are thinking about the issues and inviting the advocates to tell them why they were on the wrong track, the advocates must be willing and able to be drawn into the debate so that the clash of ideas occurs in public. The legitimacy of the process requires that the advocates must risk engaging in a debate which might result in a loss of the ground staked out in their written arguments.

Courts are engaged in actually making the law in its most concrete expressions. As is necessarily the case with the development of the common law, the legitimacy of the court's function is critically dependent on the public nature of the process whereby antagonistic positions are peacefully resolved.

Oral argument ensures that the interests and claims in issue and the arguments for and against are not masked from public scrutiny. In another context, Louis Brandeis famously observed that "sunlight is said to be the best of disinfectants"[28]. Brandeis was speaking of corporate financial misbehaviour; but his point is good for the exercise of judicial power generally. Transparency is an essential aspect of the work of the judicial branch. Nothing guarantees transparency like vigorous oral argument in public.

While the public drama is, of course, only part of the judicial process – the judgment writing is yet to come – it is the most direct way of allowing members of the public to see the interplay of competing principles and rules which lead to acceptable resolutions of great public controversies.

Even though the likely outcome of the case may not be apparent to the observers, those who have attended the argument will have a good idea of what is in contest and why it may rationally and fairly be resolved one way or the other. I would venture to suggest that in our High Court, in the Supreme Court of Canada, in the Supreme Court of New Zealand, and in the Supreme Court of the United Kingdom, no-one who attends the argument, whether personally or online, can be in any doubt as to what is at stake or as to the nature of the arguments which bear upon the resolution of those issues.

The mantra "keep it simple, stupid" is very misleading. The truth is, of course, that litigation is not a matter of **keeping** it simple. The arguments which we are called upon to present and to resolve are inevitably complex: they need to be **made** simple. It is only the great advocates who

[28] Louis D Brandeis, "Other People's Money And How The Bankers Use It", (1914) New York, Frederick A Stokes Company at 92.

succeed in making complex cases seem simple. Michael McHugh AC QC has observed[29] that the secret of Sir Garfield Barwick's success as Australia's pre-eminent advocate lay in his ability to simplify what was complex and to illustrate an abstract proposition with a concrete example. This is quintessentially a skill developed and displayed in oral argument. It is very much the product of a tradition that began and flourished in the Inns of Court, rather than in the Universities.

The exercise of this skill is harder for barristers today than ever before because our confident and rights conscious fellow citizens who are the clients, and the commercially savvy solicitors who brief the Bar, often bring moral and economic pressure to bear to pursue every possible line of argument regardless of your view of its merit. It is the essential, albeit the hardest, part of the Bar's job to counsel your clients and your solicitors out of that approach. The Bar needs to be brave. It might lose the support of some solicitors as a result, but will in the long run be – and be seen to be – better for it. And the courts will be better for it too.

This is also, I think, a problem for the maintenance of public confidence in the performance of the judicial function if it is confined to the evaluation of written arguments in the privacy of the judge's chambers. The seclusion of decision-making is at best bureaucratic and at worst a step towards the theocracy of Black and Douglas.

And finally at a fundamental level of human cognition, the written word is not a closed, or even a stable, source of meaning. The limitations of the written word, and therefore of written argument, have been notorious since the Athenians. In Plato's dialogue "Phaedrus"[30], he has Socrates say:

> "Writing, Phaedrus, has this strange quality, and it is very like painting, for the creatures of painting stand still like living beings; but if one asks them a question, they preserve a solemn silence. And so it is with written words; you might think they spoke as if they had intelligence, but if you question them, wishing to know about their sayings, they always say only one and the same thing. And every word, when it is written, is bandied about, alike among those who understand and those who have no interest in it, and it knows not to whom to speak or not to speak; when ill-treated or unjustly reviled it always needs its father to help it; for it has no power to protect or help itself."

After the written arguments have been exchanged, the prospect of synthesis between seemingly irreconcilable decisions may be no more than a hazy or blurred prospect glimpsed only in the light of sparks struck by the clash of strong statements in the written brief. It is in oral argument by skilful advocates that the court gets the most focused, and therefore the most valuable, assistance. The process of dialogue – thesis, antithesis, synthesis – is rarely accomplished, and never satisfactorily accomplished, by the exchange of written arguments between the parties.

The days of rapturous oratory before juries are long gone – and that is probably no bad thing, much as it pains an Irishman to say so, especially in this place dedicated as it is to the memory of the greatest American orator of the second half of the 20th Century. But while there may be no

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[29] McHugh, "The Rise (and Fall?) of the Barrister Class" in Gleeson and Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*, (2008) 165 at 189.

[30] Plato, "Phaedrus", 275 d-e, Trans H N Fowler, 1914 Cambridge Mass., Harvard University Press.

place in our courtrooms for the oratorical flights of Erskine or Daniel Webster, there is still place for the rhetorical skills so beloved by the Athenians because advocacy remains the art of persuasion, and persuasion is something quite different from the demonstration of the truth of a proposition from Euclid.

**Conclusion**

It is essential to our democracy that the Bar survives: it is a pillar of the third branch of government. The reason that the Bar will survive is because of the fact that it is, quite simply, the most interesting profession in the world. Advocacy is a job that good people want to do even if it is not highly remunerative. And it does not flourish in the bureaucracies of the mega-firms. To adopt John Kennedy's language "it is something that we do, not because it is easy, but because it is hard."

In the end, it is because there will always be young lawyers who want to do what is hard, and yet so professionally rewarding, not in terms of money but at a much deeper human level, that the Bar will survive.

Welcome to the conference.