

DEFENDING UNPOPULAR CAUSES IN A CLIMATE OF FEAR

That I am delivering this lecture in 2006 is a great honour for me. Apart from the distinguished company in which I am making this speech it is a particular honour to be doing so the year after it was delivered by Professor Tim McCormack.

Tim and I have not known each other all that long but in a short time we have formed a strong friendship and since I have known him, Tim's compassion and depth of intellect have always amazed me.

In 1963 Martin Luther King wrote a book entitled "Strength to Love" in which he asserted that:

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.

I chose tonight's topic particularly with lawyers in mind, because where the unpopular cause is embodied by an individual accused of serious crime, it is inevitably left to lawyers to defend them. We do live in times of challenge and controversy.

Because an undermining of the rule of law and due process has been led by the United States in recent times, I want to refer to some of the unpopular causes in which lawyers in the US have distinguished themselves and where the rule of law has been defended.

I take three examples:

In the 1840s, the United States lawyer William Seward, who later became Abraham Lincoln's Secretary of State, defended a black man named William Freeman, who had stabbed four white people to death and wounded several others. One of the miracles of the case was that Freeman got to trial without being lynched by the local community, bent on revenge. At trial, Seward established that Freeman was in fact insane. In the course of the trial, when addressing the jury the following inspirational words came from Seward:

I plead not for a murderer. I have no inducement, no motive to do so. I have addressed my fellow-citizens in many various relations, when rewards of wealth and fame awaited me. I have been cheered on other occasions by manifestations of popular approbation and sympathy; and where there was no such encouragement; I have at least had the gratitude of him who's cause I defended. But I speak now in the hearing of a people who have prejudged the prisoner and condemned me for pleading his behalf ...

And, immortalised by Hollywood, who among us old enough to recall could forget the 1950s movie with Spencer Tracey and Frederick March “Inherit the Wind” depicting the great Clarence Darrow in the Scopes trial in Tennessee in the early 1920s. Darrow was defending a teacher, John Scopes, who was accused of breaking a state law by teaching Darwin’s theories of evolution and had the rare privilege of cross examining the prosecutor – something I have long wanted to do.

In the 1930s lawyer Sam Leibowitz, a Jewish New Yorker, went to Alabama and defended the “Scottsboro Boys” – 9 young black men who were accused of raping two white women and who, in those days, were lucky to make it to trial before being lynched. They were in fact innocent – a little like the famous middleweight boxer Rubin “Hurricane” Carter who served many years gaol for a murder he did not commit despite the exposure by Bob Dylan in his song “The Hurricane”. The important thing about Sam Leibowitz was that he did his job under threats of death and courtroom attacks requiring State Troopers to protect him because of both his cause and his religion.

And presently as we speak, Clive Stafford Smith – British lawyer now in the US with our own Richard Bourke. He has done in excess of 300 death penalty cases in Louisiana and Texas, acted for British detainee Moazzam Begg, recently released from Guantanamo Bay, and now represents most of the other Guantanamo detainees.

The unpopular cause has been described as a vital respect in which the law must serve our society which is ‘often misunderstood by the layman and almost as often disregarded by the lawyer’. In the criminal law such unpopular causes, in the form of publicly maligned accused people, are required to be defended regardless of the means of the accused and certainly regardless of the offence they are alleged to have committed.

In 1963 the US Supreme Court in *Gideon v Wainwright* overturned that Court’s earlier view of the entitlement to counsel under the 6th Amendment to the US Constitution and extended it to all indigent accused. And in 1992 the Australian High Court effectively agreed in *Dietrich v R* and it was one of the great humanitarian judges of that Court, Justice Deane, who specifically echoed the sentiment expressed twenty years earlier in the US Supreme Court.

In her researches on this topic of defending unpopular causes, Professor Abbe Smith from Georgetown Law School has come to the view that the promise of the US Supreme Court in *Gideon v Wainwright* has not been met in the US.

One of the authorities she relies upon for that conclusion is Stephen Bright who, in 1994 was the director of the Southern Center for Human Rights in Atlanta, Georgia and Visiting Lecturer in Law at the Yale Law School. He had been involved in representation of those facing the death penalty at trials, on appeals,

and in post conviction proceedings since 1979. He wrote a lengthy analysis of some of the very poor quality of representation in capital proceedings under the title "*Counsel for the poor: the death penalty not for the worst crime but for the worst lawyer*". At the end of his article he concluded:

So long as juries and judges are deprived of critical information and the Bill of Rights is ignored in the most emotionally and politically charged cases due to deficient legal representation, the courts should not be authorized to impose the extreme and irrevocable penalty of death. Otherwise, the death penalty will continue to be imposed, not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.

I can recall Clive Stafford-Smith telling me that in an early death case he was involved in the trial lawyer had slept through much of the proceedings. Clive felt optimistic on the basis that he only to stay awake to do a better job.

Fortunately we do not face that kind of dilemma in Australia.

While I am on death penalty cases, let me refer to a current death penalty case that looks like an unpopular cause right in the middle of the climate of fear.

I have watched on with what I hope is not misplaced professional pride as lawyers who apparently believe in the principle have defended Zacarias Moussaoui, the only person to be charged in an American court room in direct connection with the events of September 11.

Can you imagine what it would be like to defend a person who laughed and sneered as the prosecutor played to the jury the recording of people losing their lives in the World Trade Center towers and ridiculing the families of those people as they wept through the proceedings? He then enters the witness box and jousts, not with the prosecutor but with the defence lawyer. Indeed he agrees with what is being put to him by the prosecutor. In particular, on the question of whether he should be executed, Moussaoui apparently said that he would try to kill Americans if his life was spared finishing with the phrase "Any time, anywhere."

And one of his defense counsel was Gerald Zerkin who is publicly criticised by his client for being both American and also for being Jewish, carrying on the Sam Leibowitz tradition.

And earlier this month that jury in Alexandria, Virginia said life imprisonment rather than death. Perhaps some of them thought there had been enough death.

In this era that case was probably the epitome of an unpopular cause within the fear of terrorism. The US government spent four years and millions of dollars

prosecuting this man who did not in fact participate in the attacks on September 11. He was in custody at the time. Georgetown Law Professor David Cole pointed out when interviewed on Australian radio that the absurd part about this was that the Americans have Khalid Sheikh Mohammed, the alleged mastermind of the September 11 attacks, in custody at Guantanamo Bay. He has been there for 3 years. However, they can't try him because he has been tortured and his trial, at least in any civilian criminal justice system, would turn into a trial of the US Government and their interrogation techniques.

In Australia the willingness of lawyers to defend unpopular causes has usually been in good supply. A privilege of being Chairman of the Victorian Criminal Bar Association is leading a group of lawyers who do this kind of work day in and day out and often for very limited reward.

A local example, still talked about, occurred 40 years ago in March 1966. Three Victorian barristers represented two small-time criminals who broke out of Pentridge Prison in December of 1965, allegedly killing a Prison Warder in the escape and a second person while on the run.

Phil Opas QC and Brian Bourke defended Ronald Ryan; Jack Lazarus defended Peter Walker. The case changed Opas' professional life and he left the Bar. Ultimately it ended Ryan's life on 3 February 1967; he was the last person to be hanged in Victoria. In magnificent fashion Brian Bourke just keeps on going.

Contemporary colleagues of mine continue this tradition. For example, Chris Dane QC vigorously defended Bandali Debs ultimately convicted of the brutal murder of the two police in Moorabbin. Before he was DPP, the late Geoff Flatman (later Justice Flatman of the Supreme Court) defended in the Walsh Street murder trial. Amidst a media frenzy Colin Lovitt QC defended Greg Domaszewicz at the murder trial and inquest into the death of Moe toddler Jaidyn Leskie. Lovitt's attitude to such cases hit the mark when he said:

I think that's really what drives the criminal defence lawyer – the determination that his client get a fair trial ... Regardless of the crime, the infamy of the case, the notoriety of the client, the difficulty of the case ... no matter how unpopular you might become by doing it.'

These were all cases where public notoriety was extreme. Everybody had a view and few of those views if any were sympathetic.

However unpopular causes are not only represented by clients who have already been publicly condemned as dangerous, guilty and unworthy by the media and police before they stand trial.

There are different unpopular causes that also need to be defended in a climate of fear – the rule of law itself; due process and the independence of the judiciary.

The role of lawyers in the 21st century is changing in response to the challenges directed at the rule of law as Australia becomes dominated by pragmatic social conservative governments both at a State and Federal level.

We are now without enough politicians as leaders who will take an idealistic risk and lead the nation on human rights and civil liberties. Instead the economy, fear of terrorism and border security dominate. Our Federal leaders have a well developed, carefully spun instinct of job preservation and they watch the public mood with great care. They react to it by the development of policy which will meet with electoral approval based on economic prosperity making little allowance for the idealism which might lead the community to social improvement.

And so the security of political incumbency is underpinned by, among other things, a climate of fear of terrorism and more generally a fear of 'the other' (whether it be on the basis of religion, race, ethnicity or political beliefs).

It is lawyers, particularly those concerned with the criminal law and other human rights issues, that must become more involved in the debate because it is lawyers who understand the consequences and the potential of the erosion of the individual freedoms we take for granted. And that means unpopular causes.

It might be the defence of those charged with terrorism or it might be the public debate which has been magnificently led by Julian Burnside QC on the sorry state we now have in Australia where authorised by the judgment of the High Court in *Al-Kateb v Goodwin* in 2004 a person can be detained indefinitely in immigration detention.

So far as those charged with terrorist offences are concerned, defending the unpopular cause is now hampered by the 2004 National Security Information (Criminal Proceedings) Act. That Act among other things provides that the Federal Attorney-General is entitled to be treated as a party to criminal proceedings, thus signalling to the jury that the particular matter is so serious that it requires not just the Commonwealth Director of Public Prosecutions but the assistance of Phillip Ruddock himself.

The practical effect of that legislation is that during such a trial in which the Attorney is participating if the counsel for the accused wants to ask questions of a particular witness or to adduce particular evidence and the Attorney General believes such evidence might in some way jeopardise national security, he can halt the proceedings in order to issue a certificate which would require the court to be closed and a secret hearing conducted from which the accused might be excluded to decide whether the evidence could be called.

The judge is required to give primary weight to the AG's certificate in deciding whether or not to admit the evidence. That certificate cannot be challenged. In May 2005 this Act was extended to all civil litigation rather than just criminal trials. That means that those who wish to challenge preventative detention or control orders may be precluded from dealing with the material on which they were detained or controlled.

In circumstances where Federal politicians compete with each other only to demonstrate who could be tougher on terrorists or refugees and who see lack of significant public sympathy for such people, it is left to lawyers to make the public argument which is often a defence of the rule of law itself. It is left to lawyers to remind the community about the rule of law. It is the role of lawyers to remind the community that due process has a meaning which is critical to avoiding the abuse of Executive power. In the current climate of fear this is the sometimes unpopular cause.

Fifty six years ago courageous Australian lawyers, including the great Ted Hill QC and Ted Laurie QC, then juniors rather than silk, stood in the High Court in November and December 1950 representing the Australian Communist Party itself and various trade unions who successfully challenged the validity of the Menzies Government's *Communist Party Dissolution Act* of that same year. The Act was largely based on the naval and military defence power of the Commonwealth under section 51 of the Constitution

At the time there was a deep and public fear of communism. Winston Churchill had coined the phrase "iron curtain" in a speech in 1946 and spoke of the risks of Soviet expansion. The Soviet Union blockaded Berlin from 1948 to 1949. Australian troops were in Korea and the Peoples Republic Of China came into existence. Joe McCarthy, the Senator from Wisconsin, had begun his campaign of vilification and the FBI had started to inquire into whether certain movie stars were communists.

In an article published last year in the University of Western Sydney Law Review, Justice Michael Kirby referred particularly to the Communist Party Dissolution case. He placed it into a personal context which was that he was then 12 years old and his great uncle, who was a decorated Gallipoli veteran, was also an idealistic communist.

Very briefly, one of the interesting things about that case in the modern climate is that the *Communist Party Dissolution Act*, had it survived the challenge, would have both instantly dissolved the Australian Communist Party, and also provided a procedure by which groups of persons possessing communist affiliations or connections could be the subject of an application to the Governor-General in Council to be declared an unlawful association. When you read the case you will see a different method but some interesting parallels between the criteria for selection of organisations that might be the subject of such a declaration and the

modern efforts under the Criminal Code to broadly criminalise organisations which can be designated as terrorist.

As Justice Kirby noted, the majority of the Court intellectually led by Justice Owen Dixon held that the Act was unconstitutional. Justice Kirby drew attention to the dissenting judgement of the Chief Justice, Sir John Latham and particularly his quote from Oliver Cromwell saying that "*being comes before well being*" – a quote which implied that the very existence of the Commonwealth of Australia was under threat.

In my own time I remember several causes that were extremely unpopular. One such cause was the opposition to the war in Vietnam. Still feeling the effects of the communist threat and in all-the-way-with-LBJ atmosphere, which bears a striking resemblance to our present relationship with the Bush White House, Australia sent troops to prop up a corrupt regime in Saigon supposedly to prevent the communist invasion from the north – the domino theory prevailed. A favourite act of resistance of mine during that period was by the great Mohammed Ali who risked everything rather than accept compulsory enlistment in the US Army. In passing I have to admit that his world title fight against George Foreman in what was Zaire in 1974 is, to me, perhaps the most inspiring sporting event in modern history.

Of course ultimately that cause converted from an unpopular cause to a popular cause. The Whitlam government was elected and then was quickly flawed and defeated by a man I detested at the time and who I now admire enormously for his outspoken courage – Malcolm Fraser has become our conscience.

The most recent trigger point for the change of climate was obviously September 11. Now in this country the pressure from the fear of terrorism seems to me to have caused our community to lose a further degree of its sense of moral outrage at some of the developments which are occurring in the name of defending public safety.

For example, that public fear has triggered a debate about whether torture might in some circumstances be not only tolerated as a necessary evil, but even legally recognised and supervised.

As American congresswoman Jane Harman found out, it is now necessary to think like a post-911 lawyer. She asked a Dick Cheney staffer whether he was worried that the Vice President might be charged after shooting his hunting partner in the face. She was told that her problem was that she was examining the matter like a pre-9-11 lawyer. Post 9-11, the Vice-President had all the constitutional authority he needed to take that shot!

Now there are several categories of unpopular causes that require urgent defence. Regrettably the rule of law may be the most unpopular cause that requires defending in these modern post 9/11 times.

One of the arguments that has been raging in the United States in recent times has been the extent to which the Authorization to Use Military Force given to President Bush a week after September 11 in 2001 permits curtailment of statutory rights by allowing so-called warrantless wire-taps in the US and the establishment of the demonstrably unfair and unjust (to the extent there is any difference) military commissions at Guantanamo Bay.

But as the rule of law and due process is compromised in the name of the war on terror, we would do well to consider the principles under which the Nazi leaders were dealt with at the end of World War 2. This was a catastrophic regime for Europe and the world and at the insistence of the United States, war crimes trials were held for the very reason articulated so clearly by Justice Robert Jackson when he opened the Nuremburg trials in November 1945 and emphasising the need for fair trials said:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.

So, my topic is not just about defending unpopular causes – it is that defence in a climate of fear – currently, the fear of a random terrorist attack as occurred in September 2001 in the US.

As many have observed because it is obvious fear weakens the determination to protect rights when an assurance is given that to diminish those rights will protect us and, in any event, if you have nothing to hide you won't need those rights anyway. And people buy that logic.

Thus, we are kept in fear of terrorism though no terrorist attack has yet occurred on Australian soil.

On the strength of that concern the support for a US President who seems almost devoid of principle or talent for his office reached record highs. Now with incompetence after Hurricane Katrina and the American public seeing the dishonesty of the rationale for the war in Iraq and the deaths of many American servicemen, let alone Iraqis, the support has reached record lows.

Here in Australia, such momentum as the Federal Opposition had generated prior to the Tampa incident and 11 September quickly dissipated and has never returned and neither has the idealism – it is just too risky. Me-too-ism is safer.

All this occurred under the stewardship of a Prime Minister who quickly recognised the benefits of incumbency and the ease with which frightened voters would be content to empower police forces and intelligence agencies in a way they could not previously have dreamed of.

One feature of what is happening is a government and social tendency to exclude particular groups from the entitlement to basic human rights. That is said to be necessary because we live in different times. The case of David Hicks is such a case.

This case is poisoning our credibility.

Those who defend the present arrangements accuse him of being a terrorist and deserving of the fate that has befallen him. But just examine a few features of the military commission process that he has been trapped by and ask yourselves why our government not only condones the process as fair but encourages it, demonising Hicks himself for daring to pursue habeas challenges in the US courts.

Through weakness or wilful blindness, the Australian government (unlike the British Government) simply refuses to engage on this issue. The Prime Minister looks into the lens of the camera with that slightly angular expression he gets and says “We disagree that it is unfair” and after all if he did not go through this process he could not be charged with anything here and since we have spent so much time demonising him, we couldn’t have that, could we? For those concerned about due process and the rule of law, the sight of John Howard and George Bush fawning over each other last week is almost too much to bear.

However, there are a few problems with the Hicks case that have made it harder for the Australian government to demonise him in order to demonstrate that he deserved his punishment even if it was not imposed after a trial.

The first problem is that David Hicks is an Australian with an ordinary decent father who has stood with his son at every step of the way. Australians like that.

The next problem is that for obvious reasons there are no Americans at Guantanamo Bay and when, by some oversight, they have found their way there they have been quickly pulled out and placed into the US civilian system.

And the English don’t like Guantanamo Bay; they do not think its justified and all their citizens have been released. And nuisances like Attorney General, Lord Goldsmith and Lord Steyn have expressed their outrage publicly about the way the system at Gitmo works.

Thirdly, there is another nuisance known as Major Dan Mori of the US Marine Corps. He may not be photogenic, but he is made for television. He is articulate, reasonable and everybody loves him.

And worse for the Government, Major Mori is credible – why? Because he is a marine doing his job. Whenever I have made speeches about this case I am regularly asked about what is happening to Major Mori's career? It is assumed it would be under threat.

The Australian government's support for Guantanamo is unsustainable. In many ways the unpopular cause has become popular because many Australians see the injustice. So what does the Government do? They just ignore it and hope that this flawed process will find Hicks guilty of something – anything – and then they can say it wasn't a trophy trial – whoops, sorry – wrong trial.

On a topic dear to my heart let me demonstrate how pragmatism and the desire to capitalise on the fear of terrorism has compromised the Prime Minister. The topic is capital punishment. Australia abolished capital punishment in the 1970s by among other things, a Federal Act of Parliament. In 1990 we ratified the 2nd Optional Protocol to the International Covenant on Civil and Political Rights. That protocol is aimed at the abolition of the death penalty as a matter of human rights and human dignity. Mr. Howard's position? He is against the death penalty for pragmatic reasons – what are they? Mistakes can be made – never mind the principles. He is against the death penalty for Australians. Whether he likes it or not his message to the electorate is that he is for the death penalty for terrorists and Saddam Hussein. Why? Because he knows that a large proportion of Howard's battlers feel that way and rather than lead on principle he compromises Australia's standing on the issue.

These days another sometime unpopular cause is the defence of our judiciary in the face of regular, populist and sometimes hysterical criticism. Within the modern media there is now an outrage industry. One of the results of this outrage industry is that comments about the criminal justice system which would normally attract condemnation are forgiven – indeed pass without comment signifying acceptance.

It is very much an issue in the United States. The Executive Director of an organisation known as "Justice at Stake" - Bert Bradenberg in referring to the US criminal courts says we are in a cycle of public criticism of judges at the moment. Criticism, he says, is not a bad thing. Judges are public servants and certainly not beyond criticism. However, the point he makes is that unlike previous eras there is now an outrage industry in tabloid newspapers and cable news services. In ensuring that the role and independence of our judges is protected and thus the rule of law itself is protected, this is something that we as lawyers must be careful of.

The outrage industry that operates both in the US and here tends to be triggered by a particularly bad case where a horrible crime has been committed and a judicial decision has, for example, excluded important evidence or imposed a lenient sentence. The outrage will be manifested as either complaints about the sentence imposed, or the fact that a criminal has been allowed to go free. Rather than reporting the detail of how the decision or sentence came to be passed, and exercising their editorial judgment by educating the public about the importance of an independent judiciary, the media solution is often to turn the judge into the villain. The idea is to exclude him or her from the mainstream and accuse the judge of being unaccountable.

Attacks on judges like this are very harmful because they undercut the credibility of the courts and they empower governments to accept the public assertion often beginning with victims groups that judges are out of touch with the community.

Judges are human – I do not have any doubt that some judges and magistrates are influenced by this pressure. However, often the result of the public discussion is that politicians begin an analysis of how the discretion of judges can be contracted with measures like minimum mandatory sentencing.

In addition, recently, we had to endure the Commissioner of the Australian Federal Police suggesting that in a trial where a jury had heard all the evidence that his police could find against Jack Thomas and brought back a verdict of “not guilty” on the two most serious counts, the jury had somehow got that wrong. It was time, he suggested, that more inadmissible evidence was put before juries so they could know the full story and would not be embarrassed when they acquitted accused people in ignorance of that evidence. And who expressed outrage about that? Me. That was it.

We simply must defend the independence of the judiciary and the criminal justice process at all costs. It is our most important means of preserving the rule of law. Political interference with the process is *per se* to be regarded as undesirable particularly when supported by law enforcement agencies. I have been to countries where judges are compromised and once that happens, public confidence in the system collapses and the risk of anarchy is high. Sierra Leone is such a place.

There are a huge range of causes to be defended both individual and institutional. We as lawyers have the responsibility to conduct that defence and we should do it with pride. As Mohammed Ali would say:

“Me; we”