The Practice of Law: Justice or Just a Job?

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I Why Study Law?

Most actions have many causes, and the causes of human conduct are generally complex. Putting to one side my own reasons for enrolling in law school, my impression of my contemporaries is that they were motivated largely by an instinct for justice, and to a small but measurable extent by the lure of a large income. Those in whom the desire for money was greater were generally those who already enjoyed its privileges; those who most sought justice had often been stung by its absence.

Even allowing for this range of variation, many of my contemporaries involved themselves in the social justice issues of the time: equal rights for women; the war in Vietnam; inertia selling; bogus auctions and (great victories behind them) improved car parking for students.

Watching my contemporaries and others over the following decades a pattern emerged. The focus shifted gradually: as a substantial income became more likely, it became more desirable. Soon the impulse for justice was re-cast as starry-eyed idealism; the naïve privilege of youth. Serving the client's needs, no matter how venal, was in the ascendant; attending at the community legal service fell away. One by one we succumbed to takeovers or pleading summonses; disputes about wills or tax, broken limbs and broken promises. Since betrayal and cynicism were so much a part of daily work, betrayal of earlier ideals seemed almost natural.

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Nevertheless, I share with Tom Stoppard the view that we are all born with an instinct for justice. In *Professional Foul*, one of his characters tells of the child who in the playground cries 'It's not fair' and thus gives voice to 'an impulse which precedes utterance'.[1] Our perception of justice may be blunted by exposure to its processes. At the start of a career as a law student, we see Law and Justice as synonymous; later we fall into cynicism or despair as clients complain that Law and Justice seem unrelated. We might remember the observation of Bismarck, in a different context, saying '[h]e who likes sausages or law should not see them in the making.'[2]

Little wonder that our early ideals are swamped by realities which would never have attracted us to Legal Process 101.

II Early Days

The contest between idealism and venality need not end in a snarling stand-off. An honourable compromise is always possible. For me, the secret lies in an observation made by Sir John Young, who was Chief Justice of Victoria when I was admitted to practice. In his welcome speech to newly admitted practitioners, he said something I have remembered ever since: partly because of its force, and partly because I heard it again every time I appeared to move someone else's admission to practice. He urged us to remember that '...in a solicitor's office, and in a barrister's chambers, every matter is important to someone...' I was encouraged when I heard those words, because my entry into the practice of law had been accidental, and the signs were not auspicious. I did not expect to be favoured with cases of importance.

Sir Ninian Stephen was part of the chain of accidents which led me to go to the Bar. In my final moot, Sir Alistair Adam presided, with Mr Justice Stephen (then of the Supreme Court of Victoria) and the moot master, Mr Bill Charles. Stephen J was leaning back with a characteristically contemplative look on his face, and was rolling his chair back and forth on its easy castors. Suddenly he disappeared, only to reappear a moment later at the bottom of the steps which gave access from the bench to the well of the court. To say that this was disconcerting for a budding advocate does not fully capture the moment. Once he had regained his proper position and his composure, I made a distinctly undergraduate observation about what had fallen from the Bench, and resumed my argument. I was heartened by the incident, because it showed something of the human fallibility of judges.

Later I had some luck in intervarsity mooting, and it was suggested that I should go to the Bar. For want of any better ideas, I agreed.

At the same time, I was given a biography of the great American trial lawyer, Clarence Darrow. He seemed like a fine role model. Darrow

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1 Tom Stoppard, *'Every Good Boy Deserves Favour' and 'Professional Foul'* (1978) 90.

2 Otto von Bismarck, World of Quotes <http://www.worldofquotes.com/author/Otto-von-Bismarck/1/> at 26 May 2004.

believed passionately in his client's cause and – win, lose or draw – his clients always knew Darrow had done his best. Not that this was wholly altruistic. A grateful client once gushed 'Mr Darrow, how can I ever thank you?' His reply was immediate: 'Madam, since the Phoenicians invented money, there has been only one answer to that question.'[3]

If the administration of Justice is to command respect, it is essential that every client knows that their lawyer did as well as possible; and if the client thinks they have had a fair go, then the system has worked well.

Early years at the Bar taught me several useful things. First, you take the work offered, even if it is a long way from Clarence Darrow territory. This helps avoid starvation. Second, success generally does not come overnight. Not for me in any event. I had no connections in the law. Appearances were infrequent and mostly unexciting. For the first few years, I imagined myself the victim of a defective phone, or perhaps of some dark conspiracy to keep briefs away from me. Most of my friends were doing better than I was.

But spare time offers great opportunities. In the late 1970s I taught myself how computers work. Friends tolerated this as a harmless eccentricity. It turned out to be more useful than I could have imagined: by 1981, when the PC was introduced, I was quite proficient at using computers for litigation support. It came in handy later on.

More importantly, I started reading more biographies of lawyers: Marshall Hall, Rufus Isaacs, Patrick Hastings and many others. I read about their great cases and learned, vicariously, how cases are fought. Reading first hand accounts of great court battles helps inspire a sense that the legal system, for all its faults and detractors, serves a great and noble purpose. I also learned that many advocates had started at the Bar in unpromising ways: I cannot over-emphasise how comforting that was as I plodded my way dimly into an uncertain future.

After a time, I found myself doing mostly taxation and company work. But when the takeovers boom of the early 1980s happened, I found myself quite busy (as did most people) and had the chance to watch some of the great advocates in action: Sher, Finkelstein, Merkel, Goldberg, Richter, Hughes, McPhee and many others. It was a privilege seeing real advocates at work. From time to time I had the good fortune to find myself briefed in interesting cases. Little by little I learned about the skills of the advocate. I still was not in Clarence Darrow territory, but at least I could see the path which led there.

More recently, I have been lucky enough to be briefed in some quite significant cases. The attempt by Archbishop Pell to suppress an exhibition of photographs by Andres Serrano in 1996;[4] the dispute between the Maritime Union and Patrick Stevedores in 1998;[5] the Broadcasting Authority's enquiry

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3 Clarence Darrow, *Encyclopedia: Clarence Darrow* (2005) NationMaster <http://www.nationmaster.com/encyclopedia/Clarence-Darrow> at 5 December 2005.

4 *Pell v The Council of the Trustees of the National Gallery of Victoria* [1998] 2 VR 391.

5 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 77 FCR 478; *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 77 FCR 456; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1.

into 'Cash for Comment';[6] the case of the Tampa asylum seekers[7]: these were causes which had significance beyond the interests of the immediate combatants. These were not only interesting cases to be engaged in. They serve as a useful reminder that the Law is an essential part of a properly functioning society; that the courts stand as an impartial guardian of the rights of the weak against the wishes of the powerful.

Almost always our legal system works well in this, its most essential function.

III Justice and The Rule of Law

It would be unwise however to be complacent about the Rule of Law in Australia. It is a remarkable thing that politicians, especially the present Prime Minister and the present Attorney-General, seem to have no taste for the Rule of Law as an ideal. They are given to attacking the judiciary; and neither the present Attorney-General nor his predecessor have shown any inclination to protect the judges who traditionally remain silent in the face of attack.

Consider the following matters:

- The Howard government's attacks on the High Court for its *Mabo* and *Wik* decisions;
- Senator Heffernan's outrageous attack on Justice Michael Kirby: an attack which was fuelled by the Prime Minister even as he pretended to have nothing to do with the matter;
- Mr Ruddock's regular attacks on the Federal Court in relation to refugee appeals. In particular, his suggestion that some activist judges were trying to 'deal themselves back into the judicial review game'; and Daryl William's conspicuous silence where he should have defended the courts;
- The government's repeated attempts to narrow the ability of the courts to review decisions of the Refugee Review Tribunal: a deeply flawed body which makes life and death decisions;
- The government's complete failure to help two of its citizens, David Hicks and Mamdouh Habib, held by our most powerful ally for more than two years, without charge or trial, in Guantanamo Bay. Our government seems unconcerned by such a flagrant failure of the rule of law;
- Perhaps most ominously, the Prime Minister's response to the passage of a Bill of Rights by the ACT parliament: he said it was a disturbing development because a Bill of Rights tends to interfere with the way government does business: that, after all, is the point of a Bill of Rights.

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6 Australian Broadcasting Authority, *Commercial radio inquiry (commonly referred to as "Cash for comment")* (2000) <http://www.aba.gov.au/newspubs/radio_TV/investigations/policy/cash_for_comment.shtml> at 5 December 2005

7 *Victorian Council for Civil Liberties Inc and Another v Minister for Immigration & Multicultural Affairs and Others* (2001) 110 FCR 452; *Ruddock v Vadarlis* (2001) 110 FCR 491; *Ruddock and Others v Vadarlis and Others (No 2)* (2001) 115 FCR 229.

Any discussion of a Bill of Rights will quickly lead to a discussion of judicial activism: the favourite boo-word of today's Conservatives; useful because of its unfixed content and pejorative connotations. In a constitutional democracy, the Constitution, including a Bill of Rights if one has been adopted, will limit the powers of Parliament. Someone has to determine whether Parliament has exceeded those limits. The Constitution gives that function to the courts.

Governments do not like their power to be limited. When a judge says that Parliament has gone beyond the limits set by the Constitution, frustrated governments are now inclined to attack the judges, by branding them as 'judicial activists'. This is particularly so where the limits are not obvious, or their ascertainment involves consideration of contemporary social conditions. Here, the competing considerations are clear: do the words of a Constitution have a single, fixed meaning for all time, or are they to be reinterpreted as Society evolves and unforeseen social conditions emerge?

The black-letter view led to the discredited decision of the US Supreme Court in the Dred Scott case:[8] seven of the nine Justices decided that the words '... all men are created equal ...' in the Declaration of Independence did not refer to African-Americans.

The alternative position was captured perfectly by Oliver Wendell Holmes. He said 'A word is not a crystal, transparent and unchanging – it is the skin of a living thought, and changes its meaning according to the time at which, and the circumstances in which, it is used.'[9]

This is not the occasion to enter upon that debate, but it is worth understanding that recent attacks on the courts have entirely overlooked the complexities which judges have to resolve and the subtlety of the process of resolution; and it is worth noting the cowardice involved in attacking a group who traditionally do not seek to defend themselves publicly, more particularly when their traditional defender leads the attack. These attacks put the Rule of Law at risk.

It is specifically in the area of refugee appeals that the ideals of the Rule of Law come most obviously under attack. For that reason alone, anyone who values the Rule of Law should be concerned about developments in that area. But in that area, the problem has a different form: some laws are inherently unjust. The law which requires that asylum seekers who arrive in Australia without a visa should be detained indefinitely is an example of such a law. It is a law which is almost unthinkable if it applied to members of our own society: all Jews, for example, or all blonde children.

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8 *Scott v Sandford*, 60 US 393 (1857).
9 *Towne v Eisner*, 245 US 418, 425 (1918).

A Antigone

Sophocles dealt with this difficulty in *Antigone*, nearly 2500 years ago.

Polynices has been slain. King Creon has ordered that his body remain on the hillside where the dogs and vultures will devour it. Any person who removes the body to bury it will be put to death by stoning. Antigone is Polynices' sister. She proposes to bury his body, and captures simply the central moral point: 'He is still my brother'.

Her sister Ismene, while sympathetic, fears to do what she knows is right. The argument is found in the following lines:[10]

> **ANTIGONE** I will not urge you, no nor, if you yet should have the mind, would you be welcome as a worker with me. No: be what you will; but I will bury him: well for me to die in doing that.
>
> I shall rest, a one loved with him I loved, sinless in my crime; for I owe a longer allegiance to the dead than to the living: in that world I dwell for ever.
>
> But if you will, be guilty of dishonouring laws which the gods have in honour established.
>
> **ISMENE** I do them no dishonour; but to defy the State, I have no strength for that.
>
> **ANTIGONE** Such be your plea: I will go to heap the earth above the brother whom I love.

We sympathise with Antigone's instinct, and with Ismene's weakness.

Her crime is discovered, and Antigone is taken before King Creon. She explains her actions in a way familiar to those who know the Natural Law theory of jurisprudence. Creon charges that she has broken the law he made, and she responds:[11]

> Yes; for it was not Zeus who made that edict; not such are the laws set among men by the justice who dwells with the gods below; nor deemed I that your decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of to-day or yesterday, but from all time, and no man knows when they were first put forth.
>
> Not through dread of any human pride could I answer to the gods for breaking these. Die I must, I knew that well (how should I not?) even without your edicts. But if I am to die before my time, I count that a gain: for when any one lives, as I do, compassed about with evils, can there be anything but gain in death?
>
> So for me to meet this doom is trifling grief; but if I had suffered my mother's son to lie in death a corpse unburied, that would have grieved me; for this, I am not grieved.
>
> And if my present deeds are foolish in your sight, perhaps a foolish judge arraigns my folly.

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[10] Sophocles, 'Antigone' in *The Tragedies of Sophocles* (Sir Richard C Jebb trans, 1957 ed) 127.
[11] Ibid 141–2.

B Human Rights

Human rights law is an attempt to give direct legal force to the basic principles Antigone would have recognised immediately. All too often, however, the principles remain unenforceable: no more than position statements to ease the conscience of those whose human rights are never challenged.

Australia's attitude to human rights has been oddly equivocal. In the aftermath of the Second World War, and despite its remoteness and its small population, Australia took a leading role in the formation of the great human rights conventions of the late 1940s. The process, inspired by events of the preceding decade which had 'shocked the conscience of mankind'[12] gave expression to a widely held view that the genocide of one group affected all members of the human family, that some rights were inherent in the condition of humanity, and that there were many in the world so vulnerable and powerless that the rest had to care for them without regard to national boundaries. It was an idea of great reach. Australia not only supported the adoption of the Declaration, it advocated that the rights enshrined in the Declaration should be enforceable, not merely a statement of hope or principle.

The *Universal Declaration*[13] and the Geneva[14] and Genocide[15] Conventions were monuments built over the wreckage of war and infamy. They were the product of a vision of a world made new: a grand vision of life and hope and the possibility of better things. Australia played an admirable role in those days of hope.

At the same time, the Australian government was taking Aboriginal children from their parents in pursuit of a well-intentioned, but deeply flawed, social theory. More recently, our treatment of asylum seekers has been impossible to reconcile with any genuine commitment to human rights.

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[12] Eleanor Roosevelt, *Statement on Draft Covenant on Human Rights* (1951) Department of State Bulletin, 1059 <http://www.udhr.org/history/statement.htm> at 5 December 2005.

[13] *Universal Declaration of Human Rights*, GA Res 217A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217A (1948).

[14] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Convention (III) Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, adopted 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, adopted 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).

[15] *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

IV Law and a Just Society

Plainly, strict adherence to the Rule of Law is necessary, but not sufficient, if we are to have a Just Society. John Rawls propounded an interesting, and straightforward, test for a Just Society:[16]

A Each person has an equal right to the most extensive scheme of equal basic liberties compatible with similar schemes for all;

B Social or economic inequalities must satisfy two conditions:

a They must benefit the least advantaged members of the society; and

b They must be attached to offices and positions open to all under conditions of fair and equal opportunity.

The Israeli philosopher Avishai Margalit built on this by posing the question: Will a Society which satisfies Rawls' test of a Just Society also be a *decent* society? Put differently, is a Just Society consistent with the presence of humiliating institutions? The question is important, especially where we are concerned with the rights of outsiders: people who are not members of the society in question. Rawls is concerned with the rules which members of a given society may adopt for the distribution of the goods of that society. Margalit's question tests a society by its institutions: a society which tolerates humiliating institutions is not a decent society, regardless whether those humiliating institutions have local, or more remote, consequences. That a society tolerates a humiliating institution tells about the decency of that society even though that institution may be used to humiliate only outsiders.

What does Margalit's question mean? Imagine a village in which food aid is to be distributed. Each villager needs one kilogram of rice. A just distribution may be achieved by visiting each house in the village and handing out the appropriate number of rice parcels. An alternative means is to drive through the village and tip the rice parcels off the back of the truck, with police on hand to ensure that no-one tries to take more than one package. Both methods result in an equal distribution, and thus satisfy Rawls' test. But the second method is humiliating. As Margalit says:[17]

> The distribution may be both efficient and just, yet still humiliating ... The claim that there can be bad manners in a Just Society may seem petty – confusing the major issue of ethics with the minor one of etiquette. But it is not petty. It reflects an old fear that justice may lack compassion and might even be an expression of vindictiveness. There is a suspicion that the Just Society might become mired in rigid calculations of what is just, which may replace gentleness and humane consideration in simple human relations. The requirement that a Just Society should also be a decent one means that it is not enough for goods to be distributed justly and efficiently – the style of their distribution must also be taken into account.

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[16] John Rawls, *A Theory of Justice* (Originally published 1972, revised edition, 1999).

[17] Avishai Margalit, *The Decent Society* (1996).

On the face of it, a Society may contain humiliating institutions and yet be a Just Society. But Margalit propounds a twist. Of all the goods which must be equally distributed, the most fundamental is self-respect. Self-respect precedes other basic goods – freedom of thought, speech and movement; food and shelter; education and employment – because self-respect is necessary if a person's existence is to have any meaning at all. Without the possibility of self-respect, a person's life has no point; pursuit of life's goals is a meaningless exercise.

Although Margalit is concerned about matters at a deeper level, any lawyer who has practised for a time will recognise the shape of his complaint: the legal system worked according to its rules, but the result was not just. The intricate machinery of the legal system, working perfectly, would satisfy King Creon but not Antigone.

If we are to pursue Justice, we must be prepared to question the laws we help administer.

Let us look at some contemporary examples of the problem.

V Indefinite Detention

Article 14 of the *Universal Declaration of Human Rights* provides that every person has a right to seek asylum in any territory to which they can gain access. Despite that universally accepted norm, when a person arrives in Australia without prior permission and seeks asylum, we lock them up. This is so notwithstanding that they have not committed any offence by arriving in Australia without prior permission.

The *Migration Act*[18] provides for the detention of such people until they are either given a visa or removed from Australia. In practice, this means that human beings – men, women and children, innocent of any crime – are locked up for months, and in many cases years.

They are held in conditions which are degrading and destructive. The United Nations Human Rights Commission has described conditions in Australia's detention centres as 'offensive to human dignity'.[19] The United Nations Working Group on Arbitrary Detention has described Australia's detention centres as 'worse than prisons' and observed 'alarming levels of self-harm'. Furthermore, they have found that the detention of asylum seekers in Australia contravenes Article 9 of the *International Covenant on Civil and Political Rights*,[20] which forbids arbitrary detention.[21]

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[18] *1958* (Cth).

[19] ABC Television, 'Government Rejects Immigration Detention Centre Report', *Lateline*, 31 July 2002 <http://www.abc.net.au/lateline/stories/s636943.htm> at 5 December 2005; comment by Justice Bhagwati, Special Envoy of the UN Human Rights Commissioner.

[20] *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976).

[21] *Report of the Working Group on Arbitrary Detention, Addendum: Visit to Australia. Executive Summary*, UN Doc E/CN4/2003/8/Add2 (24 October 2002).

Every responsible human rights organisation in the world has condemned Australia's treatment of asylum seekers. Only the Australian government and the Australian public are untroubled by our treatment of innocent, traumatised people who seek our help.

A Baxter

The Baxter detention centre, four hours north-west of Adelaide, opened in August 2002. I first visited it in early March 2004. Stand outside, facing east: the view is a perfect Fred Williams landscape of dull grey-green scrub on red sand, stretching away undimmed for miles to a rim of hills.

Turn and face west: a six metre high electric fence which stretches away into the distance; 20 metres of no-man's land, then another tall and glittering line of wire and mesh; inside the second fence, a series of compounds made of uncompromising corrugated iron. The compounds are so designed that the inmates have no view except of the sky; more importantly, no-one outside can see those locked inside.

Getting into Baxter is a long process: one week's notice; fill out a form, show appropriate ID. You are then escorted to an electronically controlled gate, through the gate and into a metal cage. After a time – five, ten, twenty minutes – the gate at the other end of the cage opens and you can enter a small demountable cabin; there you are searched and scanned; another security air-lock and you are escorted across to the visitors' compound where you find the real tragedy, our hidden shame. Asylum seekers walk around as if still alive; they talk as if they still have a hold on rational thinking. They press hospitality on you: an irrepressible cultural instinct, like the unwilled twitching of a dying animal. But they are not wholly there: they are hollowed out, dried, lifeless things, washed up and stranded beyond the high-water mark. Their minds are gone: shredded, destroyed by hopelessness and despair. Children are incontinent from stress; many inmates are afflicted with blindness or lameness which has no organic origin: the bewildered mind's final, mute protest.

Mr Ruddock announced Baxter as Australia's 'family-friendly' detention centre. Presumably that deceit was intended to distract our conscience. It is difficult to get there, so most Australians rely on the government's blandishments for their understanding of how we treat asylum seekers.

Mr Howard has made it clear that the mandatory detention system, and the iniquitous Pacific Solution, are designed to 'send a message'. What does this mean? It means that we treat innocent people harshly to deter others. The punishment of innocent people to shape the behaviour of others is impossible to justify. It is the philosophy of hostage-takers. Any Society which is prepared to brutalise the innocent in order to achieve other objectives has stepped into a moral shadow-land.

B Effects of Detention

The effect of indefinite detention is to diminish, if not to deny altogether, the self-respect of asylum seekers. They are fed adequately, they are housed safely. But they are addressed by numbers rather than names; they are told in every way imaginable that they are unwelcome in this country; their life stories are contested in every detail, with a view to defeating their claims for asylum. They are treated in every way as if they are not quite human.

These circumstances produce behaviour which is utterly uncharacteristic but, according to psychiatrists, utterly predictable. They harm themselves, they kill themselves, they damage the environment in which they are held. The effect on children is particularly marked. They internalise the reason for their incarceration, reasoning: 'Bad people are locked up; I am locked up; therefore I am bad'. They fail to flourish, they regress into infantile behaviour. Pre-pubescent suicide attempts, which are almost unheard of elsewhere, are common in Australia's detention centres.

Adults see their lives as having no hope and no meaning. They become listless and depressed, or they become desperate and aggressive.

Beyond all these symptoms is the dominant theme reported by a huge majority of detainees – a feeling of abject hopelessness. They do not understand why they are locked up like criminals, even though they have committed no offence. At some deep level, they rationalise it as reflecting a deep unworth in themselves.

Unfortunately, the government of John Howard has abandoned decency and justice in its treatment of asylum seekers to a degree which is almost incredible. A few examples may illustrate the problem.

C Lock Them Up Forever

Mr al Masri was a Palestinian from the Gaza Strip. He arrived in Australia in June 2001 and was placed in Woomera Detention Centre. He applied for a protection visa, claiming to be a refugee. He was refused a protection visa and asked to be returned to the Gaza Strip. Although Mr al Masri was able to produce a passport, officers of the Department of Immigration were unable to return him. Five months passed and Mr al Masri remained locked up in Woomera. He applied to the court for an order releasing him from detention. The government resisted the application.

Here, I need to say something about the constitutional basis for mandatory detention under the *Migration Act*.[22] The Australian Constitution entrenches the separation of powers. The three powers of governments – legislative, executive and judicial – are vested in the three

[22] *1958* (Cth).

different arms of government. The powers of one arm of government may not be exercised by another arm of government. Accordingly, the Parliament, established under Chapter I, cannot exercise the powers of the executive government which is established under Chapter II. Courts established under Chapter III of the Constitution may not pass laws. Punishment is central to the judicial power. Only a Chapter III court can inflict punishment on a person. Locking a person up is generally regarded as punishment. However, the High Court has acknowledged that there are circumstances where detention is necessary for the discharge of an executive function.[23] In those limited circumstances detention imposed directly and without the intervention of a Chapter III court will be constitutionally valid. This holds good only as long as the detention goes no further than can reasonably be seen as necessary to the executive purpose which it supports.

The *Migration Act* [24] requires that all unlawful non-citizens should be detained and should be held in detention until granted a visa or removed from the country.[25] Mr al Masri's case presented a conundrum: he had been refused a visa but he could not be removed. The question then was: should he remain in detention?

The trial judge held that Mr al Masri's continued detention was no longer valid.[26] On appeal, the Full Federal Court agreed.[27] A related case has since been heard in the High Court, on the same question.

At every level up to and including the High Court, the government has argued that, in these circumstances, it can hold an innocent person in detention for the rest of his or her life. I do not know how the High Court will decide the matter. What is profoundly important to recognise is that the government of a rich western democracy was prepared to advance an argument for holding an innocent person in prison for the rest of that person's life.

D Harsh Conditions

There are other aspects of the mandatory detention system which bring into sharp relief the attitude of the current government to human rights issues.

Woomera opened for business in December 1999. It was closed in September 2002. At its peak, it accommodated nearly three times as many people as it was designed for. Conditions in Woomera – physically and psychologically – were shocking. Until public pressure forced some measure of improvement, a woman having her period would

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[23] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
[24] *1958* (Cth).
[25] *Migration Act 1958* (Cth) ss 178, 189, 196(1).
[26] *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 122 FCR 168.
[27] *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54.

have to queue for sanitary pads. Children held in Woomera typically developed enuresis: a colleague of mine described the haunting image of a 12-year-old Afghan girl wandering around aimlessly in the dust at Woomera, wearing a nappy. On enquiry, it emerged that the child was incontinent from the stress of detention. Desperate acts of self-harm were common.

On one occasion, detainees escaped from Woomera, only to be recaptured shortly afterwards. They were charged with escaping from immigration detention. The defence to those charges went like this: detention under the *Migration Act*[28] is only valid so long as it does not constitute punishment. It will constitute punishment if it goes beyond what is reasonably necessary for the administrative purpose of processing a visa application and (if necessary) removal from the country. Conditions in Woomera go beyond anything that could be reasonably necessary for the purpose of visa processing and removal from the country. Accordingly, detention in such harsh conditions is not detention of the sort authorised by the Act, with the result that what they escaped from was not 'immigration detention' but some other, unauthorised, condition.

In order to produce evidence of the conditions at Woomera, subpoenas were issued to the Department of Immigration and ACM – the private prison operators who then ran all of Australia's immigration detention centres.[29] The Department and ACM sought to have the subpoenas set aside. First, they said that the subpoenas were oppressive in their operation. For example, they said that it was oppressive to have to produce all of the 'incident reports' which the subpoenas sought. The contract between the Department and ACM requires ACM to keep 'incident reports' in respect of 'incidents' in the camp.

The government argued that it was oppressive to require them to produce all the incident reports because, they said, in the 2½ years since Woomera had opened, there were more than 6000 incident reports filed: roughly seven incidents every day.

More importantly, the Department and ACM argued that the proposed defence could not succeed as a matter of law. This involved the proposition that no matter how harsh the conditions in Woomera might be, they were nevertheless lawful, and a court could not interfere. Because of the way in which the question arose, the government had to argue, and did argue, that even the harshest conditions of detention imaginable would nevertheless be lawful.

It is interesting to stand back and reflect on the stance taken by the government in that case: innocent people may be held in the harshest conditions imaginable and nevertheless that detention will be lawful.

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[28] *1958* (Cth).

[29] The contract has since been given to GSL (Australia) Pty Ltd, a Group Four Falck company.

Coupled with the argument in al Masri's case, those same innocent people might be held in unimaginably bad conditions for the rest of their lives and yet it will be lawful.

These are arguments worthy of the legal positivists of the Nazi regime. It is difficult to understand what has happened to the Australian polity that our federal government is prepared to advance these arguments. The only explanation that occurs to me is that the media are not sufficiently interested in the detail or meaning of what the government is doing under the guise of 'border protection'.

E Solitary Confinement

Officially, solitary confinement is not used in Australia's detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a video tape of one of the Management Unit cells. It shows a cell about 3½ metres square, with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; it is never dark. The occupant has nothing to read, no writing materials, no TV or radio; no company yet no privacy because a video camera observes and records everything, 24 hours a day. The detainee is kept in the cell 23½ hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky.

No court has found him guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

VI Taking a Stand

I learned, through the Tampa case, something I should have recognised earlier: that asylum seekers are confronted by unjust laws being implemented by a government which has lost touch with ordinary standards of decency. It had a profound effect on me. I knew that it was not possible to stay in Australia and do nothing about these outrages.

Taking a stand is not without its cost, but as Arundhati Roy has said:[30] 'A thing, once seen, cannot be unseen; and when you have seen a great moral crime, to remain silent is as much a political act as to speak against it.' I was challenged on a social occasion by someone who should have known better; she asked: 'Do you think it appropriate that a barrister be so public about an issue?' I replied: 'Do you think it appropriate to know about these things and remain silent?'

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[30] Arundhati Roy, *The Algebra of Infinite Justice* (2002).

The practice of law offers many rewards. At its best, it plays a profoundly important role in achieving real justice. Every case is important to someone, and we serve the law by seeing that it is upheld and administered according to its own rules in every case.

But there comes a time when to uphold the law is to betray Justice. Any society which legitimises the mistreatment of a defenceless group poses a great challenge for lawyers. We face a stark choice: we can lend ourselves to the enforcement of immoral laws, or help to resist them and perhaps change them. As lawyers, we cannot urge others to break the law, but we can speak out against those laws; we can help ameliorate their operation, and we can seek to invalidate them.

If Justice is the lawyer's vocation, we must not ignore its call when Justice is most threatened. A moral crime is all the worse when it is sanctioned by law. We can never forget that the worst excesses of the Nazi regime were carried out under colour of the Nuremberg laws. Those laws were administered by conscientious judges and practitioners, most of whom were doubtless attracted to study Law because they had an instinct for Justice. In their pursuit of Law, they failed Justice terribly.

If we, who understand the law, cannot recognise a bad law for what it is, then who can? If we do not take a stand, who will?