THE FOURTH TONY FITZGERALD MEMORIAL LECTURE

23 June 2016

NORTHERN TERRITORY LIBRARY, DARWIN

LEX LASRY

It is very nice to be in Darwin in June where the weather is so much kinder.

It is appropriate for me to say at the beginning that, unlike probably all of you, I did not know Tony Fitzgerald and my links with Darwin are only very occasional. It has been something like 10 years since I was last here.

Unlike a number of Victorian barristers I was not part of the Frank Vincent/John Coldrey efforts in the Northern Territory, though of course I admired their efforts, which were extensive.

In speeches in Melbourne, Coldrey regularly tells the story of their involvement in the trial of the so-called Huckitta Station 5 in the case of Collins and others in 1979 along with John Dee, Dyson Hore-Lacy and Peter Waye from South Australia. I will return broadly to that topic a little later.

I should say that one of Coldrey's claims to fame is that he says he lost the last murder trial conducted in the old Alice Springs court house and also the first one conducted in the new one.

So, it is an honour to be invited to give this lecture and to be among Northern Territory legal professions as I know there are some big issues about the criminal justices system here. Sadly I will never again be able to share your Bali conference much as I enjoyed it when I did attend a few years ago.

I know Tony Fitzgerald was born in Sydney and practiced law initially in Melbourne. His memory here in Darwin is obviously of a man willing to stand up for those much less well off than he was and his active involvement with indigenous people. At law school one of his immediate concerns was apparently whether his law degree could be used to do social good. He came to Darwin in 1978 and worked with the Aboriginal Legal Service.

He worked for 4 years with the Aboriginal Legal service and then in private practice and later the Legal Aid Commission. In 2002 he became Anti-Discrimination Commissioner and made a detailed and scathing submission to the review of the Howard government's Northern Territory Emergency Response legislation.

He was obviously a Northern Territory hero for his commitment both as a lawyer and a person. In paying my respects to him I can do no better than quote from Patrick Dodson's lecture in 2012 when he said:

> *Tony believed that Justice had to be for all Territorians no matter where they lived or their circumstances. He was a remarkable man and his life and the values he asserted should continue to be recognised and considered.*

In Melbourne, in many ways, we have a much more distant understanding of the issues for indigenous people because we confront them only occasionally. The figures show that as at 2015, the proportion of adult prisoners in Victoria who identified as Aboriginal and Torres Strait Islander was 8% (483 prisoners) whereas here it is 84% (1,344 prisoners).

Although I have defended indigenous clients, including one charged with murder, and sentenced several as a judge I claim no expertise at all. All I know is that respect and acceptance is the only viable basis for solving the continuing problems. I fear that remains beyond many Australians.

In Melbourne, I watched in absolute horror as racism ended the career of the great Swans footballer and Australian of the Year, Adam Goodes. His withdrawal, understandable as it was, is a great shame because, as his career demonstrated, he has a great deal to contribute.

So, heroes are important and when we lose them unexpectedly or even expectedly, we reflect a little.

The world lost Muhammad Ali a couple of weeks ago. For many, me included, he was a hero though not without his flaws. Whilst his stance against the war in Vietnam and the racial hatred of the time was significant, his own racist treatment of Joe Frazier in the lead up to the fight in Manila in 1975 was hard to forgive and Joe Frazier never did forgive him.

But Ali was a beautiful athlete and apart from his extraordinary ability as a boxer and 3-time world heavyweight champion, he stood up for himself and African Americans generally in a

time when it was still dangerous to do so. The last recorded lynching occurred in Alabama in 1981.

In an extraordinary eulogy for Muhammad Ali last week, Billy Crystal said Ali was a lightning bolt of power and beauty and he taught us in his later life that:

"Life is best when you build bridges between people, not walls."

Such an approach is obviously of universal application and relevant to all kinds of aspects of Australian life.

I saw this in operation last Thursday night when I attended the vigil of support in Melbourne's Federation Square for those murdered and wounded in a gay club in Orlando Florida. As an ally of the LGBTI community I am very conscious that such an event could happen anywhere including Melbourne or Darwin. I experienced the solidarity of that community with a simple message – love and respect, not violence.

So, I have looked back through my predecessors giving this lecture and it is an intimidating list.

I should respectfully note that it was hard not to be both impressed and intimidated by the exposé of Justice Virginia Bell last year on the separation of powers. Her speech highlighted for me something important – it showed me what I am not.

So, let me come to, as it were, the theme for what I want to say to you this evening. It is in many senses reflective – you may think there is a certain lack of discipline involved on the part of this aging judge. I walked into the Monash Law School almost 50 years ago. I was a barrister for 34 years. I have been a judge for almost 9. It's nearly finished.

Earl Warren was a former Chief Justice of the US Supreme Court appointed by President Eisenhower and he served on the court between 1953 and 1969. During World War II he had been governor of California and held that position for 3 terms. As Governor he was a social and economic conservative.

Although a Republican candidate for the Vice Presidency, legally he was a judicial activist and liberal. As Chief Justice he was in famous cases – *Brown v The Board of Education* in 1954 on segregation in education, rejecting the concept of equal but separate; and the famous *Miranda v Arizona* in 1966 concerning the entitlement of suspects to be informed of their rights.

It is noteworthy that at that time it was taking judges not legislators to protect the rights of people in police custody. *Miranda* was decided 10 years before the ruling of Justice Forster here in the Northern Territory in *Anunga*. The circumstances in Miranda were quite different but the principles had a great deal in common as summarised by Warren CJ at the commencement of his judgement:

> *The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.*

His Honour also famously conducted the Warren Commission on the assassination of President Kennedy in 1963 .

I mention him for tonight's theme because he famously said,

"In civilised life, law floats in a sea of ethics".

Though I did not know Tony Fitzgerald, I am confident that's a sentiment he would agree with. Certainly my experience tells me how important such a concept is.

But how often does the law float on something other than ethics – on something other than fairness, tolerance, compassion, respect and forgiveness?

Sadly over the years in many of the cases that I have been involved in where the law meets politics, the law has been floating not so much on a sea of ethics but rather a sea of political self interest and fear.

In my own experience after 34 years as a barrister, much of it as a criminal lawyer, I became a judge of the Supreme Court of Victoria some 9 years ago.

But believing that law is underpinned by ethics, as a new judge in 2007 I had to master some previously unfamiliar concepts.

They included qualities such as objectivity and impartiality – not usually the pre-eminent qualities of a criminal defence lawyer. I have forced myself to enjoy the humour of others such as for example in a particularly nasty murder trial and in summarising the conduct of

the accused in killing the deceased, as well as a whole lot of other things he did to conceal the killing, the prosecutor said to the jury, "Ladies and gentlemen -- all I can say is that if Moses had known the accused, there would have been two or three more Commandments."

In my time I have religiously followed John Coldrey's sage advice. Never eat Mexican food before giving final instructions and legal directions to a jury.

When I was appointed to the Court I had, for two years, been counsel for Andrew Chan and Myuran Sukumaran. I had already acted for Van Nguyen in Singapore between 2002 and 2005. In both of those cases, the governments of Indonesia and Singapore claimed that they were doing no more than applying the law and that there was identifiable merit in the legalised murder of a prisoner.

In 2005, after the Singapore Supreme Court had unsurprisingly found Van Nguyen guilty, we prepared a clemency application. It took weeks to put together. It was the plea we would have made if the death penalty had not been mandatory.

It was a document of 60 or 70 pages and we delivered it personally to the President's office. Then weeks passed – nothing. Then, out of the blue a letter, not to us but to Van's mother that said the application for clemency was rejected. The letter informed that he would be executed on 2 December 2005. It concluded with the request, "Please make funeral arrangements."

On the day that he was hanged in the early morning in Changi prison, Prime Minister Lee Hsien Loong had the temerity to say that it was no more than the application of the rule of law.

Likewise, and despite a mountain of evidence to demonstrate that it would make no difference, Indonesia's President Widodo insisted that it was necessary to kill Chan and Sukumaran in 2015 (ten years after their conviction) in support of a war on drugs in Indonesia. And so, with 6 others, they were executed, as you know, by firing squad at Nussa Kambangan in Indonesia in April 2015. Two men who had spent much of that ten years rehabilitating themselves and other inmates at Kerabokan prison in Bali.

It is, of course, not that in these cases they are Australians. The cultural heritage of those clients was, in any event, Vietnamese, Sri Lankan and Chinese. But they came from this country and their families were and are here so it was appropriate that we help them as best we could. In both cases the lawyers failed to prevent their legalised murder.

I officially ceased my involvement in Sukumaran and Chan's case when I was appointed to the Supreme Court and it was then very capably conducted since by Julian McMahon, the Indonesian human rights lawyer Mulya Lubis, Peter Morrissey SC, Michael O'Connell SC, Megan Tittensor and a number of others but to no avail.

So, it is very important work and I sometimes wish I was still part of it although, to a degree, I have stretched the rules by maintaining a peripheral involvement which seemed to become less and less peripheral.

In the case of Andrew Chan and Myuran Sukumaran I became quite actively involved in the weeks leading to their death. I vividly remember my last meeting with Myuran and as I walked out of the gaol I knew I would never see him again. I was struck by how this affected me. When Van Nguyen was executed I was his lawyer. When Chan and Sukumaran were executed I was, to some extent, just their friend. It's a tough gig. All of them inspired me with their courage as they faced their certain death.

Sadly, I remain committed to never again entering Indonesia. It's all I can do, as one person, to signify the disgust I feel at what they did.

The cause, in relation to capital punishment around the world, is worth fighting for but it is a difficult fight. There may be some work I can do when I retire in that area in a couple of years.

So, why does this matter? Well if it be true that the law is under-pinned by ethics, there can be no ethics in any government deliberately putting any person to death. All the published research demonstrates that the death penalty is no help in reducing the crime rate. What it does do is teach the community that we are to be regulated by violence both at the hands of the state and of individuals. It is barbaric.

Over the last 15 years or so, these cases have come and gone. Our relationships with countries like Singapore and Indonesia have suffered only temporarily. Our Prime Minister now refers to President Widodo as a great leader. Great leader? He determined bar nothing to execute two Australians who had spent 10 years changing their lives and the lives of others.

The ethics, of course, desert leaders like Widodo because there is a far more important consideration – politics and political survival.

So, as barristers, we all have very high ideals, unimpeachable principles and a strong sense of ethical behaviour. Take me for example. Not long before I was appointed to the Court the phone rang in my chambers and a voice from the Commonwealth DPP said, "How would you like to be our gun prosecutor in a very big drug case?"

I said, "No thank you. I am a defence lawyer – I do not prosecute. And, if I did prosecution work, I would not do yours."

The voice said, "That's a shame – the fee is $8,000 per day plus preparation. It's an international drug case so there will be overseas travel involved".

I said, "Just a minute --- I will put Mr Lasry on the line".

Because I think that judges should explain themselves whenever they can and assist to educate the community about some of these principles, I strongly adhere to the view that that we should participate in the public discussion about what we do and how it works. I do not believe in judges who only speak in Court. In my view it is unrealistic and unnecessary. Controversially I am also on social media.

Judges have insights to share and explanations to give about the work we do. We want to encourage people not to try to avoid jury service for example. In our court we probably deal with 30-40 homicide trials a year.

As you know that means we must find 12 people from the community to participate in such cases. At the beginning of a trial, they are not always keen to participate. There is a process where people are entitled to request to be excused from serving on a jury. In court, they must tell me why they should be excused. One young man told me:

> "Your Honour, I need to be excused because I can't afford to be away from my job for the 4 weeks you have told us this case will take"

I said:

> "Can't your boss do without you for 4 weeks?"

He said:

> "Yes, he can – but I don't want him to know that".

So, the willingness of people to serve on juries is a fundamental part of our criminal justice system. Inevitably at the start it seems to them like a chore and, just as inevitably, it

becomes one of the most satisfying experiences that citizens can have, as well as finally enabling them to understand how the system works. Over decades juries have demonstrated what an important hurdle they are to injustice.

In the work I do, which is almost all homicide cases, most jurors are taken aback by the experience. For example, in the case of Matthew Johnson's trial for the murder of Carl Williams at Barwon Prison, the jury watched the CCTV recording of the killing. For them that must have been a fairly confronting experience.

In the trial of Robert Farquharson for the murder of his three children, the jury could not help but be traumatised by what they heard about the deliberate drowning of three young children. You can read the detail in Helen Garner's book "This House of Grief".

Despite these kinds of problems, I have watched with pleasure as jurors adapt to their role which they immediately realise is very important. They understand the hardship between ethics and law. Some cynics say that a jury is group of 12 people empanelled to decide who has the better lawyer. I think that is a bit unfair. The truth is that if ethics are the bedrock of the law in a civilised community, juries are indispensable. There are only one or two verdicts over my years as a barrister where I though the outcome was wrong and usually the outcome was affected by the declared views of the trial judge. Say no more.

But then there is politics. Crime is more publicly accessible and for the years of the so-called underworld war in Victoria, this almost became a source of public entertainment with Carl Williams on one side and the Moran family on the other and the resultant Underbelly TV series. Some 23 people were murdered.

In recent years as the crime rate has increased in some areas, we have had to endure the politics of being tough on crime rather than smart on crime. Because it is easy, governments have almost reflexively opted for increased incarceration rates in the mistaken belief that doing so will reduce crime.

The previous Victorian State Government, like many others, succumbed to the flawed theory that the answer to crime was to rapidly expand the incarceration rate. So, they succumbed to a version of mandatory sentencing described as "baseline sentencing" where

the sentencing judge was required to, as it were, keep the figures up. The Victorian Court of Appeal had little difficulty in determining that it was unworkable.

This kind of measure is based on the tabloid view that somehow sentencing judges are out of touch with community expectations. There has been research about this, including asking jurors from trial about the sentence they would like to see imposed. The allegation of us being out of touch with expectations is flawed. The exercise of the sentencing discretion is, in my view, about the most important discretion a judge can exercise after a lifetime of experience in the law. It is the most difficult part of being a criminal trial judge. Any populist desire to contract that discretion is almost offensive.

In 12 months in Australia, the number of prisoners in adult corrective services custody increased by 10% to reach a ten year high of 33,791. The national imprisonment rate also climbed to a ten year high of 185.6 prisoners per 100,000 adult population and as at 2015 the rate is 196. Here is the Northern Territory the figure is 885 people per 100,000. That is an astonishingly high figure.

For the whole of the US the figure is around 716 per 100,000 – the highest in the world. In 40 years in that country the prison population grew from 300,000 until now when there are nearly 2.5 million people in custody and another 7 million of some form of probation or parole.

Back in Australia, our national offender rate increased by 2% to a total of 1,997 offenders per 100,000 persons aged 10 years and over.

The most prevalent principal offence in Australia in 2013-14 was public order offences (74,630 offenders or 18%), closely followed by Illicit drug offences (71,386 offenders or 18%).

The biggest percentage increase in a principal offence was sexual assault and related offences, which increased by 19% (1,169 offenders) in 2013-14.

So overall more and more people are being imprisoned but the hoped for reduction in crime is not occurring.

Meanwhile, several people in the US including Attorney General Eric Holder have realised that such an approach is not working. Five goals were identified as part of his review:

1. To ensure finite resources are devoted to the most important law enforcement priorities;
2. To promote the fair enforcement of the law and alleviate disparate impacts of the criminal justice system;
3. To ensure just punishment for low-level, nonviolent convictions;
4. To bolster prevention and re-entry efforts to deter crime and reduce recidivism;
5. To strengthen protections for vulnerable populations.

It now seems more people want help for ice addiction than for alcohol addiction. What is going on? Putting them in gaol won't help. These are young, disenfranchised people with no purpose and possibly no hope. Many of them are angry and when in custody that will simply get worse.

The American death penalty lawyer Bryan Stevenson – described by Archbishop Tutu as the new Mandela – was in Australia last year.

His book – "Just Mercy" – is about the death penalty, child imprisonment and injustice. I urge you to read it.

His central theme is: *"we, all of us, are far more than the worst thing we have ever done"*. Bryan runs the Equal Justice Initiative in the US. The opposite of poverty, he says, is not wealth. The opposite of poverty is justice.

Also on the political aspect, since September 11 2001, a large number of counter terrorism laws have been introduced in Australia that create new offences and expand powers of detention and investigation at the expense of individual liberties.

We are still having the debate that the ancient Greeks had during the trial of Socrates about the need to curtail freedoms (in that case freedom of speech) in order to make us safer. The Greeks had been threatened by Sparta. We are threatened by Islamic fundamentalism.

Ultimately, of course, Socrates was put to death for asking questions and engaging in dialogue. I am able to tell you that recently in Melbourne the Hellenic museum conducted a re-trial. I was one of three judges. Socrates was unanimously acquitted by the Bench and by the audience, by an overwhelming margin.

In the stated cause of making us safer but really in the cause of enhancing political survival, early on in the process the Bush White House established a thoroughly disreputable Military

Commission system on the eastern edge of Cuba at Guantanamo Bay, Cuba. There, the first trial conducted was the sentencing hearing concerning Australian prisoner David Hicks.

Guantanamo existed to ensure that the legal rights that would be available to all US citizens would not be available to those interned in that place. Rather than deal with prisoners in the US criminal justice system, they established their own separate system down there in Cuba which was tailored to deliver guilty verdicts. It has changed a lot since those early days and closing Guantanamo might be the last act of President Obama's presidency. If Donald Trump becomes President his first act might be to re-open it.

In direct contrast to the travesty that is Guantanamo, back here in Australia our system conducted the jury trial of my client "Jihad" Jack Thomas and the later trials of the Sri Lankan Tamils and followers of Nacer Benbrika. Benbrika and others were appropriately convicted of the offences they were charged with but Jack Thomas, despite the avalanche of publicity, was ultimately acquitted by a jury (did I mention I defended him?).

The difference in the quality of the trials was stark and I have wondered about it extensively.

For me, the David Hicks case was actually quite an enjoyable experience.

I had two trips to Guantanamo Bay Cuba in 2004 and 2007 for the Law Council of Australia. I was there as an observer so I had no client to worry about and in public and on paper I got to rubbish George W Bush at every opportunity.

Do you know, for a while on the White House website when George W Bush was President the following appeared as part of the President's biography:

"The President attended Yale University where he studied law. He regularly finished in the top 85% of his class."

So, what does all this mean? Are we now more technological and less sympathetic? Do we get compassion fatigue much more easily? Do we take too much for granted?

There is a constant tension in the law that is often about politics and fear. Many politicians rely on frightening the community in order to protect themselves.

Many in the media find the ability to capitalise on that fear in order generate revenue. And many commentators find it too difficult to be interested in compassion, fairness and tolerance when it is so simple to be angry. Keys are only for throwing away.

One thing is for certain. Every time a government tells you that by taking away some freedom or right of privacy they will make you safer, be very sceptical. It may only be a small matter but these things accumulate and rights once gone are very hard, if not impossible, to restore.

Well, Earl Warren was right. Law without ethics is arbitrary and inevitably unfair and productive of injustice. Despite the views of the Indonesian Government, the system of law does not operate in a vacuum.

The law is a regulatory system of rules that are intended to achieve, not just enforce, an ethical and cohesive community. If ethics are discarded, the law becomes a tool of oppression.

I began with a reference to Frank Vincent and John Coldrey in Collins case in 1979. For a short time after my appointment to the Court I served with both of them. I want to quote with respect and approval from the credo those two great lawyers developed over rather a lot of shiraz and which they formalised in the Federal Court appeal in Collins case the following day and which highlights the ethical underpinning of the law:

"A man has been killed. There is no suggestion in any of the material that there was any justification or even a sensible reason for his death.

For practical purposes, the only evidence against the four people who are involved in some way in the events that led to that death is to be found in this confessional material, and that poses for the legal system, a very real challenge.

On the one hand, it can be said that justice must be done, and that the perpetrator or perpetrators be convicted. On the other hand, justice must never be achieved at the cost of the integrity of the system upon which we all depend.

"Rules of voluntariness and principles of fairness underlying the exercise of discretion can be viewed as obstacles in the path of achieving what is seen to be justice in individual cases, to be removed or avoided by restrictive interpretation or sophisticated fact-finding processes. But I need hardly remind this Court that the common law has taken a long time in its development, and its wisdom and philosophy must be viewed in that same long range.

It is simply a truism that part of the cost of living in a society where there is a fundamental right against self-incrimination is that there will be occasions when perpetrators will avoid the

processes of law. But it must be remembered that it is law which they would avoid and not the exercise of arbitrary power.

The Courts must never permit themselves to become a part of conspiracy which authorises and justifies such power because it suits the short term ends in a particular case. They must never combine with others whose duty it is to enforce the law to effectively deny fundamental rights and protections to members of this community.

The police agencies must never believe that the real cost will be a judicial reprimand in a generally unread page of a law report, and that they will be forgiven their unlawful or unfair behaviour when the circumstances of the crime are serious enough. It is sufficient to say that the Courts must adhere to the professed ideals and values of the common law if that system is to retain any legitimacy…

It is always easy to want to find in favour of the clearly innocent. It is always easy to want to find in favour of the beautiful. It is a far more difficult task, it requires a far higher degree of honesty at all levels in our system, to say, irrespective of what the situation appears to be in the short term, the wisdom of the common law requires that the fundamental relationships between people, and the society in which they live, be maintained."

And, I will finish with some more words of Earl Warren:

> It is the spirit and not the form of law that keeps justice alive.

Thank you.