THE COURTS AND THE COMMUNITY

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by the Hon. Sir Richard Blackburn O.B.E.

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Acton, A.C.T.
THE COURTS AND THE COMMUNITY

Mr. President, Ladies and Gentlemen:

It is a very great satisfaction and pleasure to be invited to deliver the first of a series of lectures which the Law Society has, to my great honour, decided to name after me. To be remembered by the Law Society in such a way is an honour which very few people are lucky enough to have. I still have, and shall always have, the most vivid recollection of that evening a little more than a year ago, when the Law Society of the Australian Capital territory farewelled me by a dinner held in my honour; the warmth and sincerity of the feelings expressed by the whole of the company present gave me enormous pleasure, and my wife and I rejoice in the possession of the beautiful old Victorian writing box which you very generously gave us.

I regard the establishment of an annual lecture of this kind as a highly important step forward, and the society is to be congratulated on its initiative. The Society is the representative professional body for the legal profession in this Territory, and as such its responsibilities are various. One set of responsibilities is to the public; another to its own members. Included in its duty to the public, I suggest, is a duty to assist the community to understand such vital matters as the rule of law, the functions of the legal profession, the function of the Courts, and the independence of the judges. Included in its duty to its members, I suggest, is the provision of opportunities of professional education.

I wish to begin, this evening, by saying a word about the future of this lecture, which I hope will be an annual event. Each of the two responsibilities of the Society which
I have mentioned - of course the Society has many others - could provide plenty of topics for this lecture. My subject this evening is in the field of public interest, but the technical professional field is no less important. The boundary between them is not clear-cut, but may I suggest, for the Society's consideration, that the lectures might be in each of the two fields alternately?

I can find no better short title for what I want to say this evening than "The Courts and the Community". I propose to talk about various things, but they are all related to the themes of community attitudes to the courts, and the courts' attitudes to the community.

Why a lecture? I do not suggest that there are not other ways of communicating with the public - there are books; there are television programmes; there are even talk-back radio conversations by telephone. I do not despise any of these media, though I am less than enthusiastic about talk-back radio as a means of public enlightenment. I am unrepentant as a supporter of the old-fashioned lecture. It may not have the exuberant sparkle, wit, and cleverness of Mr. Geoffrey Robertson's Hypotheticals - this lecture most certainly will not - but at the same time it need not yield, as Mr. Geoffrey Robertson sometimes does, to the temptation of sacrificing explanation to entertainment. What a lecture has in common with a performance such as those of Mr. Robertson is that if it is any good at all, it must stimulate thought; a lecture which fails to do this is worthless. A lecture is not a means of imparting information; it is, or should be, a means of stimulating the minds of those who already have enough information to make the lecture worthwhile. That is what I shall try to do this evening. Whether I succeed will be for my hearers to decide.
If the lecture is to stimulate, it must have in it something of the personal views of the lecturer – and if you are being critical, you can refer to his views as his prejudices. I propose therefore, by way of preface, to state my own views on some fundamental matters. I state these views dogmatically now; and I am prepared to argue them at length at any other time and place. Civilized life in a community necessitates law for the purpose of achieving order – order as the air that freedom breathes, but never as an end in itself. Law is a highly complex dynamic structure which has been built up by centuries of civilized intelligence and goodwill. It may have faults and deficiencies; for them, the remedy lies in our hands, not merely in the hands of us lawyers, but in the hands of all of us members of the community. But notwithstanding its faults, it is to be cherished, respected, and obeyed. To say that law is a device whereby the ruling class maintains its ascendancy in society is a gross and ridiculous over-simplification. To say that a law need be obeyed only when the individual thinks it a good law is a puerile self-deception beneath which, in 99 cases out of 100, lies the wish to satisfy a personal desire with a reckless disregard for any but personal consequences. Both these two heresies are signposts pointing towards savagery and away from civilization. Of course, there may be a conflict between an obligation imposed by law and a standard of conduct required by one's conscience. Of course, in the last resort, the claim of conscience must succeed. But in that situation, the claim of the law, to be obeyed, is of enormous weight, for who can conscientiously claim the law's protection while flouting it, or having flouted it? There is nothing new about this; Socrates proclaimed it, both by precept and example, in 399 B.C., for all time. What would he have thought of the idea of breaking the law for the purpose of getting television coverage?
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The application of the law in a society of individuals who have both freedom and responsibility requires courts; and courts must be subject to the law, but independent of the Executive.

These are my views, or if you will, my prejudices. Everything else I say this evening takes for granted what I have just said.

This evening I am going to make some detached remarks on various topics and call them all a lecture. I certainly do not expect that you will all agree with all that I say. After 18 years as a judge I have become more and more interested in the relationship between the law courts and the community, especially the community's perceptions of the functions of the courts. I hope I need not apologise for regarding this subject as important. There is no doubt in my mind that the public has become far more knowledgeable, far more critical, of the courts, their methods, and their decisions, than they were when I was a young man. This is a fact of life, and it would be useless to deplore it, even if I wanted to, which I most certainly do not. Children at school are now taught something about the hierarchy of the courts, the constitutional function of the judges, and something about how judicial decisions are made, and how the legal profession is organized. This state of affairs was absolutely unheard of when I was a schoolboy. I have read a text-book on legal studies prepared for the use of secondary school students in this Territory, and it is in my opinion a good one. I am glad to think that some instruction in such matters is available in secondary schools. Many times, too, I have seen groups of boys and girls brought into the public gallery of the Supreme Court to observe the Court's proceedings; but I have considerable doubt about the value of this particular exercise, as they never stay for longer than half an hour, and
as far as I know, they are given no account of the case they hear, or the particular stage of the proceedings which they are witnessing.

Notwithstanding these promising signs that nowadays something is being done to increase public understanding of the functions and methods of law courts, there is, in my opinion, a regrettably large gap between the actual state of the public understanding and the desirable state. The present situation is that public concern for, and interest in, the function of the courts has run far ahead of public knowledge and understanding. I think that this is a serious matter, not merely on the obvious ground that the community should have a good understanding of its own institutions — democracy, in short, requires an informed public opinion — but also because the courts occupy a very particular and indeed delicately balanced position in the constitutional framework. When there is a lack of public understanding, the way is open to irresponsible or malicious misinformation which can only do harm to the rule of law in a free society. Judges — and when in the course of this lecture I say judges, I always mean to include magistrates — judges are not accountable to the electorate in the way in which politicians are. Judges make decisions which often vitally affect conflicting interests in the community, and the community has no means of having those decisions altered by turning out the judges or threatening to do so. That state of affairs is to me an axiomatic basis of the rule of law; but it throws into sharp relief the necessity for the community to have some understanding of the function of the judge, and also the danger of misunderstanding and misinformation.

Let me give an example. Not once, but several times in the last few years, I have read in the press articles, or letters, which include words to this effect:
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"This legislation would put into the hands of judges, who are not elected by the people, the power to make decisions which vitally affect the people."

For the moment, all that concerns me is the reference to the fact that the judges are not elected. What should follow from that fact is that judges, in making such decisions, should do so strictly in accordance with their judicial duty - by applying, in fact, what Sir Owen Dixon, in a famous and much misunderstood phrase, called "strict and complete legalism". The fact that the judge is not elected should be a constant reminder to him that he is the servant of the law and not its master; which, I respectfully submit, was all that Sir Owen Dixon meant by that phrase. If that is what is taken to be implied by the reference to the fact that the judge is not elected, then I have no quarrel with the sort of statement I have quoted. But I fear that the authors of such statements mean to imply something quite different. The suggestion is either that judges ought not to be allowed to make such decisions, or that judges ought to be elected or otherwise accountable to the electorate. Both alternatives are pernicious - the first because it leaves the interpretation of the Act to the Government and its servants, and the second because it diminishes the independence of the judges and to that extent weakens the rule of law. That is an example of what I mean by the danger of misunderstanding of the judicial function.

I repeat - the constitutional position of the courts is a finely balanced one. That fine balance can be easily upset by public misinformation and misunderstanding. The position of the courts was secure in the old days - which I agree were the bad old days - when the courts were taken for granted.
The community needs an understanding of the courts, but misunderstanding is more than useless, it is dangerous.

What, then, is the true nature of the judicial process - the process by which the judge applies the law to decide a case; and what is the public perception of it? I propose to spend a few minutes looking at these two related questions.

There are, I think, two separate views of the judicial process; both are wrong because they are over-simplifications; both contain an element of truth; the real truth, which is complex, not simple, is that they are complementary to each other and together they provide an explanation. On one hand there is the old-fashioned view that the judge, having found the facts, simply finds the law in the books, and applies the law to reach his decision. That is what might be called the classical theory. It raises no difficulties of principle because the judge on that theory does not make the law, he only finds it; and when he has found it he is bound to apply it whether he likes it or not. The judge's own views and values are irrelevant because they do not enter into the process of making a judicial decision.

At the other end of the range, there is a more modern idea of the judicial process which is equally a false over-simplification. This view has, very unfortunately, gained currency from some newspaper articles, though it is usually not explicitly asserted; it is rather an assumption to be made from what is written. The judge is assumed to be a person whose function is to apply the right values to the problem, to reach the just result; he is therefore a law-maker with an unfettered discretion to make the law whatever he thinks it ought to be. It is the opposite extreme from the view that the judge is simply a law-finder whose own value-judgments are irrelevant. It is a very convenient view
for some political theorists, some commentators on public affairs, and some journalists, because it makes things so easy for them - they can condemn a decision which they do not like, and applaud one which they do like; it is all so uncomplicated. What they are saying in effect is that the judge's value-judgments are wrong because they are not the same as those of the commentator. Two things in particular are to be noted about this view of the judicial function. One is that the judge is praised or blamed as the case may be, for having or not having the values which the commentator has; there is no room for any objective or external standards. The second thing to be noted follows from the first - if the judge holds, and applies, the values of Hitler or Al Capone, he may still be quite correctly performing his judicial function; there is nothing more to being a judge than to hold the right views, that is, the views which the Government which appoints him, thinks are the right views.

I believe that the community is at present confused because these two false over-simplifications are competitors for the job of providing a key to public understanding of judicial decisions. Let me give you an example. Not long ago the High Court had to decide the very important question whether it was lawful for the Government of Tasmania to build a certain dam. Please note the way I express it - whether it was lawful. From some of the discussions in the media at the time, one might be excused for thinking that the question was whether the High Court thought that the dam should be built, the Commonwealth Government having delegated the job of deciding this question to the Court. Some members of the community, perhaps those holding more old-fashioned views, perhaps thought at the time that the judges of the High Court could look up the question in their books and produce an impartial answer, any disagreement between them presumably being accounted for by the fact that some had looked up the
wrong pages of the book. Other members of the public, more au fait with current comment by the media, perhaps thought that the decision could be explained by the fact that Mr. Justice A was a believer in strong central government, Mr. Justice B was an upholder of States' rights, and so on.

We must all be patient and persistent and address ourselves to the task of helping the community to understand that both these simple answers are just wrong, and that the truth is complex, and not simple at all. The truth is surely that in every judicial decision - and I use the word every deliberately - there is an element of constraint, which makes the judge the servant of the law, whether he likes it or not, and also an element of value-judgment, which obliges the judge to make a decision on the relevance of a fact, or some other of the many problems requiring an element of value-judgment. Both elements enter into every judicial decision. This is not the place, nor is there the time, to attempt to satisfy those who are not convinced that what I say is correct. I myself am satisfied of its correctness beyond reasonable doubt, and I say that on the footing of my own experience as a judge, such as it is.

At the risk of being merely repetitive, let me say again why I think it is important that both the common over-simplifications, which I have described, are dangerous errors, and why I think that it is important to educate the community into rejecting them. The view that the High Court can decide whether it is lawful for the Government of Tasmania to build a dam on the Franklin River merely by reading the law books and applying some sort of reasoning process to what is in them, without applying any element of value-judgment at all, is so patently absurd and untenable by any thinking person that it lays open the courts to the charge of deluding themselves and attempting to delude the public. On the other hand, the view
that individual judges make up their minds by applying their own views on whether the forests should be conserved, or whether the States' powers should be defended against the encroachments of Commonwealth power, means that the study of the law is humbug, the rule of law a delusion, and judicial independence an intolerable fetter upon democratic freedom.

If you accept my view that the judicial process is not simple but complex, and the truth is not either of these simplicities, nor is it some middle road between them, but a combination of both, then the question arises: what should we be doing to improve the community's proper understanding of the truth? I certainly have no clear answer to this problem, nor have I any belief that there is any short and obvious road to a speedy improvement. The only thing I am sure of is that establishing the truth in the minds of men will be better achieved by patient and thorough explanation than by public relations campaigns. Let me tentatively suggest three channels for dissemination of the truth which are already in existence.

The first is one that I have already mentioned. Legal studies is a course available in secondary schools. I hope it will extend beyond the constitutional position of the courts, and their structure, to include something about the substance of the law and the nature of the judicial process. I am not in the least worried that secondary students may be deluded by such courses of study into thinking that they are learning all there is to be known about the law. That argument is not applied to the teaching of mathematics; why should it be applied to the teaching of legal studies? Of course, I would hope that a mathematics teacher would know something about mathematics; and I would expect the same of a teacher of legal studies.
My second suggestion is also one that I have mentioned before. I know how severely the Law Society and its members are constrained by limited time, and limited resources, from entering upon the field of public instruction, but I see it nevertheless as a highly important professional responsibility. May I suggest that the co-operation and assistance of the Faculty of Law be sought, and I hope it would be willingly given.

My third suggestion relates to the media, and more particularly to the Press, and this takes me into a field where I want to stay for a while. I suppose all of us who are lawyers have often been disappointed at Press reports of court proceedings. Let me say at the start that in Canberra we are relatively fortunate in that the standard of such reports in the *Canberra Times* is generally higher, in my opinion, than in other Australian newspapers. But I would like to see a higher standard. Obviously I am not a journalist, and I am well aware that there are many conflicting claims and pressures on the editorial policy of a daily newspaper. Could we see, more often than we do, an account of the judgment, or judgments, in an important case, written entirely impersonally and purporting to be no more than an impersonal account? I am not asking for unabridged reports; that would be impossible; and of course intelligent abridgment virtually necessitates an understanding of the law by the person who writes the report. The *Canberra Times*, it is a pleasure to mention, has some lawyers on its editorial staff, including the editor. If I may suggest it, there is a need for a distinction to be drawn more often than it is, between reports of judgments, on the one hand, and articles about the law and about the effects of the judgments, on the other hand. Both these kinds of legal journalism are what I would like to see, but if I may say so, they do not mix well. There was an excellent example of the latter kind - the article about the law - some weeks ago in
the Canberra Times; an article by Mr. Rod Campbell on the difficulties of the law in this Territory relating to the sentencing of persons convicted of crime. The author displayed a grasp of the subject as well as an ability for lucid explanation.

I would like to mention one respect in which I have been somewhat disappointed by the Press in the Territory. The courts do not have many opportunities to communicate, as it were, directly with the community. I can hear someone objecting that judges and magistrates can say as much as they like whenever they go into court, and that too to a captive audience. But my reply is that judges are there to hear and decide cases, not to make public pronouncements in time which is part of somebody's day in court. I respectfully agree with the great Bacon that an over-speaking judge is no well-tuned cymbal. But there are a few occasions when by custom, some matters of general importance to the community are discussed by the court in public; for example, settings for the admission of practitioners, and formal settings when a judge takes his seat on the Bench, or retires. On such occasions, very seldom is there any report in the Canberra Times of what is said, and at least sometimes I should have thought that it was worth reporting. An example that comes to mind is the sitting of the Supreme Court when the present Chief Justice was sworn in and took his seat on the Bench for the first time. Very thoughtful remarks were addressed to the Court by, among others, Mr. Faulks as President of the Law Society, and by the Chief Justice himself. It was regrettable that these remarks were not reported by the Canberra Times, which was content to describe the occasion as "Rumpolesque". It seemed a pity that a public chance of a communication from the Court to the public was lost in order to let a reporter demonstrate a slick turn of phrase.
During my term of office as a judge, I very often wondered whether the courts did all that they reasonably could do to assist the journalists. I believe that I enjoyed reasonably good personal relations with the journalists who worked in the courts, and I was sometimes asked to comment on, or explain, a decision of the Court. I believe I was right in not doing this. Perhaps this attitude was inconsistent with my plea for a better understanding of the courts by the community, but I cannot escape from the principle that a judge's function is to decide, and to give reasons for his decision in a formal judgment in which he speaks ex officio. As soon as he speaks informally he is acting without authority, and it is better to keep silent; moreover, the risks of misquotation of informal oral statements are very clear. Nevertheless, there is much to be said for a practice which I understand has been adopted sometimes by the High Court, whereby the Court releases a prepared statement which is an explanation, in summary, of the Court's decision, for the benefit not of the legal profession but of the general public. The safeguards are clear: the statement is a prepared one; it is in writing; and presumably it has the approval of every member of the court who was a party to the decision. Even so, I would be reluctant to adopt this course as a single judge. A judge should say what he means in his reasons for judgment. If he is allowed to say afterwards what he intended to mean, why not call him as a witness in a later case in which his decision has to be applied? Nevertheless, I commend this practice in an appellate court. I think it should assist in public understanding of the courts' decisions.

There is not much to be said about television and radio in relation to the courts. I believe it has sometimes been thought that judges are obstinately hide-bound and restrictive about facilities for television and photography in the
courtroom. It seems to me that there can be no objection in principle to the televising of court proceedings. If the general public is allowed to walk in and out at will — as it is — then why should not a television image of the proceedings be available to anyone who wants to look at a television set? I have heard it said that there is a danger that the proceedings will be selectively reported, so that only the sensational passages will appear on the television screens and thus a false image of the trial will be given to the public. That is what can and often does happen now in newspaper reports, but it is not used as an argument against the reporting of court proceedings in the Press. The very real and cogent objection to television of court proceedings is that, so far as I know, no court-room has built-in facilities for it, and without such facilities the apparatus and operation must inevitably bring about a totally unacceptable distraction in the court-room. Build a court-room which has facilities for television such that the lights, cameras, and other apparatus, are for practical purposes invisible, and the movements and speech of those operating the apparatus are inaudible, and I, for one, would not have the least objection to the televising of the proceedings in that court-room. Exactly the same applies to still photography in the court-room. If the movements of the photographer, the noise of the shutter, and the sight of the flash, or other special lighting, can be eliminated, why should not the public see photographs of the court in session? Recently we have been seeing drawings of persons and scenes in court — pleasant compositions — but often requiring an act of faith to be accepted as likenesses. Would photographs be any better?

But I do not believe that television and photography are a real problem. How often is there a demand for either of them? Would the provision of the necessary special facilities be financially worth while?
What I have just said about the objection to distraction in court proceedings leads me directly on to another aspect of the community's understanding of the courts - and it is one of great importance and some difficulty. It may be thought that in insisting on the absence of visual or aural distraction, the courts are being hopelessly old-fashioned and even, some may say, merely satisfying a wish for exclusiveness and prestige. Let us heed this criticism and be astute in self-examination, but nevertheless deal with the problem objectively. I very much doubt whether the lay public understands the extraordinarily high standard of perfection which the judges and the legal profession expect in the conduct of a trial, be it civil or criminal. Still less, I believe, is there a general appreciation in the community of the difficulty of achieving such a standard. The utmost fairness, total impartiality, procedural correctness, are all what the public expects, but I wonder how often it is understood how difficult these are to obtain - what standards of training, of skill, of concentration, are needed to achieve them? When this is understood, it is easier to see why the photographer or the television cameraman creates an unacceptable risk of distraction. With all respect to politicians and all other public figures who are expected to face without flinching not merely microphones and cameras thrust into their faces, but sometimes heckling and interruption, it has to be said that there is really no resemblance between the conduct of court proceedings and the public activities of those who appear in public. We are sometimes told that the courts need to be brought into the real world. The answer is that though justice is not a cloistered virtue, yet she does not belong to the hustings either.

Closely related to this point is another respect in which I believe there is a degree of public misunderstanding.
The courts are sometimes reproached for too great a degree of formality; it is said that when he is in court the man in the street feels ill at ease, in unfamiliar surroundings, where no one speaks to him in the language he is accustomed to hear in the street or at home. If this is a complaint that witnesses are made to feel inferior by a deliberately assumed superiority of manner on the part of counsel or the judge, it is of course a justified complaint — but in my experience that is very rare, and should be strongly disavowed by the Bench, like any other form of discourtesy. If, however, the man in the street expects to feel as much at home in a court of law as he does in his own home, or even in the reception area of a Government office, then his expectation is unjustified. A degree of formality — which is of course entirely consistent with courtesy — is an absolutely essential condition for the conduct of just and fair legal proceedings. I assert this with all the emphasis at my command, and it cannot be too often asserted. Perhaps those who would like to see the words "Your friendly law courts" on the outside of the building, and who ask why a witness should not be addressed by his Christian name and told to make himself comfortable and tell his story in his own words the way he wants to, might pause to consider what the purpose of the proceedings is. The witness is not there to tell his story, but to reveal his recollection of the relevant and admissible facts, and to submit to having his evidence tested by cross examination. He is required to perform an intellectual exercise which may well be an unfamiliar one — that of responding passively to the precise terms of questions put to him. His opinion of what is relevant, and even more his opinion of what is the justice of the case, is no concern of the court. In short, he is required, in the interests of fairness and impartiality, to do something which is quite unfamiliar to him. No one doubts that the witness has a difficult and unenviable task, but it is a totally unfamiliar task — different from anything he is
required to do in his daily life — and he cannot reasonably expect to be provided with an atmosphere appropriate to the performance of a familiar task.

I ask the pardon of those who are members of the legal profession, for making such a fuss about such a simple matter. I do so because I have many times thought how common is the delusion that courts of law suffer from too much formality. I suspect that the main reason for this common belief is simply that most people dislike being involved in legal proceedings, and think that the experience would be more pleasant if it were less formal. Who can blame them for disliking the experience — certainly I cannot. But the courts do not exist for the purpose of providing pleasant experiences for members of the public. Recently I got some pleasure myself, from an editorial article in the Press. The author, in the course of reproving members of Parliament for their conduct in Parliament, said that proceedings in Parliament should have the dignity and formality of courts of law.

I need spend very little time on that topic much favoured by many self-appointed experts on legal procedure, the wearing of wigs and gowns; I am inclined to think (though it is a subjective impression which could be wrong) that the public in general is far less concerned about it than the vocal minority purports to be. Most of those who attack court dress are, I believe, rationalizing their dislike of something which sets the Bench and Bar apart from the general public; that is said to be the mark of an élite. Elitism is, I verily believe, the silliest word in the English language; of course the Bench and Bar form an élite, just as the Bench, Bar, and solicitors form a larger élite. They are only two among the many élites which are part of the vital machinery of a civilized community; for example, the Ministers of the Commonwealth Government; the officers of the armed services.
Uniform dress is not thought to require justification when it is worn by soldiers, policemen, or bus drivers. Recently the magistrates in this Territory came under some criticism for donning robes. May I suggest that magistrates should be assumed to know how best to conduct proceedings in Magistrates' Courts?

I turn to a much more important matter which is the subject of some misunderstanding in the community. There is, I think, a general belief that fairness is easy to achieve in legal proceedings. Any reasonable person, it is thought, can be fair. What is really true is that any reasonable person can honestly try to be fair. But the longer I was a judge, the more I realized that it is very hard to be fair in fact. How often have I been assailed by doubt, when thinking over a ruling I had given, whether it was as fair as it could have been? I do not refer to the situation where I decided according to law, but was dissatisfied with the justice of the result; that is a quite different case. What I am thinking of usually occurred in the context of procedure. Procedural fairness is often difficult to achieve in a civil case; it is often very difficult to achieve in a criminal case, where not only is one party the Crown, which generally speaking (and quite properly) has no right of appeal, but also there is a jury, so that every word that is spoken has to be most carefully considered. It is in this area, almost more than anywhere else, that the judge needs the assistance of competent counsel. Let me take as an example a criminal trial in which there is expert evidence, and counsel on one side or the other - it does not matter which - fumbles the job of qualifying the witness, or cross examines incompetently. It is easy to say that the judge should simply sit back and let matters take their course. It is hard in practice to avoid all the dangers of doing so - the danger of appearing to be partial, the danger of allowing the jury to become confused or
misled, the danger of letting an honest witness be needlessly harassed.

All I am saying is that I doubt whether there is general understanding in the community of the sheer difficulty of being really fair in the conduct of a trial; incidentally, it is a difficulty peculiar to the trial; it does not arise for appellate judges. I think there is a widespread belief in the community not only that the fair and impartial conduct of a trial, civil or criminal, is a matter of mere common sense, so that any honest and reasonably intelligent person could do it; but also, that the man in the street, and even more the well-educated and articulate person, can make a worthwhile contribution to the improvement of legal procedure without any special study or previous knowledge. I call to mind some of the volume of public comment on the Chamberlain trial. Nothing that I say here is in the slightest degree a comment on the merits of that matter, or on the propriety of any of the several judicial decisions which have been made. All I want to do is to note the extraordinary extent to which people with no knowledge of the existing law of evidence or the rules of procedure, or, apparently, the purposes which they serve, are willing to say how they should be improved, or what should have happened at the trial. It has been suggested, for example, several times, that conflicts of expert evidence should be removed from the scope of the jury's responsibility and given to a panel of more experts to determine, the report of the panel being brought back to court to be accepted by the jury as legally indisputable fact. Lawyers who have had practical experience of the contradictory views which sometimes are expressed in court by the most highly qualified experts, will smile at the naive confidence in the soundness of a conclusion elicited by such a method. But, what is more important, what about the party whose own expert's view is rejected by that procedure? Remember that he has had no
opportunity of either influencing the conclusion, or even of seeing the process of reaching it. Will it not be difficult to persuade that party that the procedure is fair? Finally, it should be noted that these proposals, and several others of this kind, were, and still are, put forward publicly by various scientists. What would be thought of me if I were to express an opinion publicly on a question of psychology or biochemistry? The law of evidence and procedure sometimes seems to be everybody's playground.

Please note that I am not saying that the law should be a closed book which only the lawyers should be allowed to open and read. On the contrary, I have already expressed my approval of the modern tendency to provide instruction in law for laymen. All I am asking for is a better general appreciation that law is an academic and professional discipline built up from study and experience. Criticism should be welcome, but should be preceded by some effort to understand.

I would like now to turn to some aspects of criminal law and procedure in which the community is directly involved. First, the jury system. The first thing to be said about it, from the point of view of the public, is that it is a considerable burden of inconvenience, and possibly also of financial loss, to those who are summoned for jury service, and still more so for those who actually serve on juries. I am sure that strong efforts are made by the Sheriff and his officers to minimize the burdens, but they have to work with existing facilities. The present Supreme Court building in this Territory was, I believe, completed and first used in 1964 or about then; no doubt it was designed several years before that. I have often reflected how dismally it fails to provide proper jury facilities, and be it remembered that it was designed and built in the palmy days of financial
abundance for Canberra buildings of local, rather than national, importance.

The only reason for mentioning the jury facilities in the Supreme Court building is that they provide, as it were, a symbol of the discrepancy between what we expect - and receive - from the jury, and what we provide for them. I am talking now of the system, not of any particular court or judge. The jury system is the only respect in which the lay community has a direct input into the administration of justice. Twelve persons are selected from a much larger group, which is itself selected at random from the electoral rolls. The procedure for the selection of the twelve takes place in open court, and is, I believe, such as to make it apparent to all, including of course the accused, that it is fair and unbiased. I express a personal opinion, with which some judges may disagree, that the system of challenges to individual jurors could be made more effective than it is, by allowing both prosecution and defence to see, and, if required, copy, the jury lists, for a longer time before the trial than is commonly allowed now. I suggest that both sides should be able to make enquiries about the names on the lists, so that the opportunity is there for challenging jurors on the ground of some actual knowledge or reputation, rather than, as often seems to happen, their appearance and occupation. Challenges at present are mostly on a "hope for the best" basis. The reason for withholding the jury list until a short time before the trial is obviously to minimize the risk of improper approaches to members of the jury. I think this risk is very small; the penalties for such conduct are heavy, and jurors could always be asked before the empanelling begins whether any such approaches have been made to them. In my experience, we should go further than we do now in the direction of trusting the members of the public who are summoned for jury service to resist any such approach, and to report it. There
is, perhaps, a risk that such persons may be put in fear by threats; but who would be foolish enough to try to threaten a number of members of the panel, large enough to provide a reasonable chance that the empanelled twelve will include someone affected by the threat?

It is sometimes suggested that each member of the panel, as his name is called in court, should be subject to questioning by both sides, in order to discover whether he holds any opinions, or has any prejudices, which might make him unsuitable to be a juror in the case. I understand, without any personal knowledge, that this practice is common in America. Surely one of the purposes, and advantages, of having twelve members of the jury, is that individual idiosyncrasies will probably be evened out. Once again I say, "trust the jury". The community expects that when its members are summoned for jury service (a task which nobody likes) there will be the least possible demands upon their time, and also that they will not be subjected to such personal inquiries, which are uncomplimentary to their intelligence and their integrity.

We have, after all, gone a long way towards trusting the jury. No longer, save in exceptional cases, do we keep them under guard, night and day, for the duration of the trial. This means that we accept the risk that they will be subjected to improper approaches during the overnight adjournments of the trial – in itself, I suggest, a powerful answer to those who object to early publication of the jury list. But it also means that we accept the risk that the jury may, during an adjournment, read in the Press, or see on television, prejudicial material relating to the issues in the trial. I am confident that the media adopt a careful attitude to this risk, and that a combination of judicial warnings to the jury, and the law of contempt of court, provides a sufficient
safeguard. The only reason for insisting that nothing said in
the absence of the jury may be published outside the court is
to prevent the jury from learning about it during the times
when they are allowed to disperse.

Might we trust the jury a little further? I find it
difficult to produce any reasonable argument against allowing
the jury to have a copy, or copies, of the transcript of
evidence, at any rate in longer cases. Is it not unreasonable
to fear that they may be over-impressed by some particular
part of the evidence which they can read in the transcript but
might have forgotten otherwise? Courts of appeal are used to
going through the transcript minutely, yet they have not the
advantage of having, as the jury has, heard the witnesses. I
do not see why we should expect the jury to rely entirely on
their memories, subject only to their right to request a
reading aloud of part of the transcript. No doubt one reason
for withholding the transcript from the jury was to prevent
illiterate jurymen from being swayed by literate ones, but in
these days it seems unnecessary to treat them all as
illiterate.

There is another respect in which I feel strongly — and
have so felt for all the time that I was a judge — that we
ought to do more for those members of the community who are
required to serve on juries. What I now say is not in the
least a criticism of those who are now judges, for in the
first place I know how difficult it is to achieve what I want
to achieve, and secondly, I myself often failed to achieve
it. We should do more to save the time of jurymen. For
instance, why should the arraignment of the accused, and his
plea, have to be part of the trial? This archaic procedure is
manifestly a survival of the days when most accused were
illiterate, and very few were represented. An arraignment
could nowadays be a document served on the accused, and his
plea of guilty or not guilty could be a document filed in the court. As things stand, the accused is arraigned orally just before the trial. An objection to the indictment has to be heard and decided while the jury are in waiting; perhaps they are sent away for a time, but why need they be there at all? Much more common is something which happens after the trial proper has begun, namely, an objection to the admission of evidence, often involving a hearing on the voire dire, for the duration of which the jury is either sent out to sit in idleness and boredom in the jury room, or allowed to disperse; in either case, an irritation and a waste of time; and when it occurs often in the course of one trial— as it quite commonly does— a serious hindrance to the jury's concentration on the evidence. In the majority of cases, in my opinion, these matters could be disposed of in interlocutory proceedings before the trial, thereby avoiding waste of the jury's time. I know, from communications made to me personally by people who have served on juries, that there is real concern in the community about this aspect of jury trials, and in my opinion the courts should respond as urgently as possible to this concern. Clearly, the remedy is a new set of Rules of Court for criminal cases. I believe Mr. Justice Kelly and his colleagues on the Criminal Law Consultative Committee have this target in their sights. Good shooting to them!

The jury system is the point at which the community is most closely concerned with the courts, and that is why we should all be deeply concerned to ensure that it works as well and as conveniently as possible. I, for one, would strongly uphold the institution of the jury in criminal cases. I believe that the jury— a collaboration of twelve heads— is less likely to be wrong than a single judge in answering the question "is this person guilty beyond reasonable doubt?". Of all the verdicts that I took from juries in 18 years, only two were, I thought, unreasonable; one was in Darwin and one in
Canberra. Many, many times have I been impressed by the sincerity of juries and their obvious sense of public duty; one has only to recall the occasions when the jury has been called into court after six hours' deliberation, to see whether they should be discharged, or whether there is a prospect of agreement. Not infrequently they ask to be allowed to continue, saying that though they are not yet ready to deliver a verdict, yet there is a prospect of agreement.

There has recently been a tendency for the deliberations of the jury to be investigated after the trial, and revealed, and made the subject of comment. This is surely a breach of a principle that every juryman relies on, that their deliberations should be for ever confidential; surely this principle is a reasonable corollary of the requirement that the verdict must be unanimous. A juryman who talks publicly about how the jury arrived at its verdict betrays a trust which his colleagues place in each other. It is worth noting that in Tasmania the form of juryman's oath prescribed in the Criminal Code includes the following words:

"...and further that you will not at any time..." (I draw attention to those last three words)

"...disclose to any person anything touching or concerning the deliberations of this jury upon their verdict."

Similar words are included in the oath which jurymen in Tasmania are required to take before they are allowed to disperse at an adjournment of the trial.

The law should in my opinion be quite strict in this matter. I have no doubt that proper provision can be made for bona fide research.
There is one thing more that I would like to say about the jury system, and it does relate closely to the theme of the courts and the community. It is sometimes suggested that one of the benefits of the jury system is that it enables a person to be acquitted, though upon the facts and the law he is clearly guilty, if the jury disapproves of the law under which he is charged, or thinks that his breach of the law was commendable or excusable. Those who support this suggestion even contend that the judge should not purport to direct the jury on the law, but only advise them, the implication being that they are free to apply the law or not, as they see fit. It is not clear whether the supporters of this doctrine would accept that the jury should also be allowed to convict a person who is clearly innocent, if they disapprove of his conduct, though on the same principle there is no earthly reason why they should not. I say that if we accept this principle we are on the high road to savagery. The rule of law should apply to juries as much as to judges.

There is one further matter, and that of the greatest importance, which I want to discuss in connection with the community's concern with the courts in their criminal jurisdiction. There is no one word which conveniently describes this matter - it is the satisfaction which the community should feel, that persons charged with the commission of criminal offences are tried promptly and justly, and, if convicted, sentenced appropriately. The community's sense of satisfaction is of special importance in the field of criminal law, for what other purpose does the criminal law serve? I grant that sometimes the punishment of a convicted person may serve to release the outraged feelings of a victim of crime, or of the family of a victim, so as to lessen the risk of private revenge, but in general it is the public, not the individual, which the criminal law serves to protect.
The first thing to be said is that the courts, and the community, are almost entirely dependent on the media for making known the courts' decisions. There is not, and there never has been, any organ of the judicial system which has the function of making known to the public the verdicts and sentences of criminal courts. And yet general deterrence is supposed to be one of the purposes of sentencing. We hope that a sentence will have, among other effects, a general deterrent effect, yet we rely on the media, over which we have no control, to inform the public of it. And it is not only deterrence which concerns us at this point. I have just said that community satisfaction with the working of the criminal law should be one of its major aims. How can the community be satisfied if it does not know?

Let us face it - we are dependent on the media for the satisfactory working of the criminal law process in the community. I set aside radio and television, which cannot reasonably be expected to report any but the cases of very great public interest. I am concerned with the Press. In this respect I believe that the community in this Territory is now generally well served by the Canberra Times, though a few years ago there was room for complaint. Nowadays most verdicts and sentences seem to be reported, though I have sometimes wished that more space had been given to the judge's remarks on sentencing. Of course I recognize that there is enormous pressure on limited space, but I will come back later to the topic of remarks on sentencing. First I want to raise the question whether the criminal law system does all that it could do to provide community satisfaction with its workings. Before we complain about the media we should see if our own house is in order. I said earlier that community satisfaction should relate to the promptness of trials, among other things. I fear that in this Territory, and in some other parts of Australia, the system is seriously deficient in
this respect. I regard it as one of the respects in which I failed as Chief Justice; I failed to reduce to an acceptable length the average time between committal for trial and trial itself. There are several reasons why this is a very serious matter; the one which concerns me now is that it means that the community does not perceive as clearly as it ought to do, that justice is being properly done in the individual case. On the 1st of June, let us say, the community learns that a bank robbery was committed on the day before. On the 1st of September, if things go fairly well, the community may learn that a person has been committed for trial on the charge of committing that robbery. In my time, it was typically on the 1st of September the next year that the community learned that a person had been convicted and sentenced for that crime. I believe that the time between committal and trial has, since I retired, been reduced. That reflects great credit on the court and on all concerned, but what if it has been reduced by half? That is still far too long. When the community hears of an acquittal, or a conviction and sentence, its members should have a reasonable chance of recalling the commission of the crime and the circumstances of it, and thus of linking the crime with the result of the trial, and seeing for themselves that one complete operation of criminal justice has taken place. I do not believe that the criminal justice system is giving proper satisfaction to the community unless, in general, the criminal trial begins within three months of the day when the accused is arrested and charged. Of course, there will be exceptional cases. I acknowledge that the attainment of my ideal would probably require the abolition of committal proceedings in magistrates' courts. I think that would be a great step forward, but this is not the time or place to argue for that reform. If committal proceedings remain, then I say it should be the aim of the criminal justice system, both for the general purpose of community satisfaction and for the particular purpose of deterrence,
that a person committed for trial should be tried within six weeks.

I promised earlier to return briefly to the topic of reporting the judge's remarks on sentencing. If this could be done more fully and more often than it now is - and I certainly recognize the difficulties of doing so - that would be one step towards an improvement in public understanding of the sentencing process, and of the different principles of sentencing which, as Mr Justice Wells has said, "jostle with each other" in the judge's mind for priority. I must say that I am astonished - after 18 years as a judge - how many times I have read in the Press a comment on a sentence passed by myself or another judge (usually, I may say, a complaint that the sentence was too lenient) or listened to a comment made to me in conversation, about a sentence passed by another judge, and thought to myself that it was perfectly obvious that the commentator did not know all the facts of the case, and often none of the facts given on the question of sentence. In fact, I cannot remember a single such occasion - in all those 18 years - where it seemed to me that the comment was a properly informed one. The commentator has read some of the facts - those which are reported in the media - and it does not occur to him to wonder what the other facts were. Yet I am sure he would agree that a judge should not make a decision while disregarding some of the facts. Why should the lay commentator do so? One also notes a tendency for groups of people who are specially subject to particular crimes - for example, bank officers on the subject of bank robbery - to make very broad generalizations about the lenience of sentences. I have the deepest sympathy with their concern, but one wonders what thought they have given to the question of the extent to which prison sentences do in fact have a deterrent effect - among other matters?
I repeat myself yet again - I am not suggesting that judicial decisions should not be criticized. I am only asking that criticism should be better informed that it very often is.

I have spoken of the courts and the community as if they were separate, but of course the courts are part of the community; the judges are taxpaying citizens who read the same newspapers, watch the same television programmes, and form their opinions in the same way, as other members of the community. It is true that judges usually, and in my opinion properly, refrain from expressing their opinions publicly, at any rate on controversial subjects; the result is that judges as a body have a public image of remoteness from the rank and file of the community. I doubt whether this worries many members of the community; it worries me not at all. There are many splendid stories about judicial remoteness, but they nearly all date from past times. Nowadays, it seems to me, judges are criticized more for excessive sophistication than for innocent naïveté. Too often, I fear, that same old bogey of élitism raises its ugly head. There is a whole range of literature, from the academic (where it is called "jurimetrics") to the popular organs of the media, which purports to show that nearly all the judges went to the same schools, belong to the same clubs, and thus are the same sort of people and wear the same blinkers. I have often amused myself by thinking of this quaint idea, while looking at a number of my fellow-judges gathered together, say at a judges' conference. The curious thing is that those who support the "blinders" theory never seem to point to any particular decision as having been influenced by the blinkers. I would not think it worth a mention were it not for one rather disturbing result of this theory. From time to time it is suggested that the absence of these so-called élite characteristics is in itself a qualification for judicial office; for example, "let us have an aboriginal judge"; but being an aboriginal is neither a qualification, nor a disqualification, for the Bench; it is simply irrelevant.
Early in this lecture I said that in every judicial decision there must be an element - be it large or small - of value-judgment by the judge. I have just now been reminding you that the judge in his personal capacity is a member of the community. It follows that his value-judgments will be derived from the same sources as those of all the other members of the community. In this respect we are in the midst of a process of rapid change. In the past - let us say for example in the great classical period of common law and equity, the nineteenth century in England - the community was a relatively homogeneous one; it could be called a unitary society rather than a pluralist one. There were of course great eccentrics and heretics, but the traditions and cultural values of the community were relatively widely accepted in all social classes. The same was broadly true of Australia in the nineteenth and the first half of the twentieth century; I can myself remember such a time. But what a change has come over the community in the last thirty or forty years! We are now beyond doubt a pluralist rather than a unitary society. There is a great variety of values, not all consistent with each other, which are widely held in the community. The judge of today can be far less confident that the values that he applies, say to the sentencing of a convicted person, will be generally accepted by the community, than was his predecessor of fifty or a hundred years ago. When he has to discern the policy of an Act of Parliament - as he often does - he can be far less confident with an Act passed in 1985 than with one passed in 1885. Community values are in a state of rapid change and development, and the courts have to do the best they can to understand them.

What does this mean in practice for the judge of today, who must never forget that he is the servant of the law and not its master? I suggest that there is one thing that it does not mean, and that is that community values, or any particular set of them, are always right, so that the judge
has an obligation to make a decision which a substantial part of the community will regard with approval. The judge is not a legislator, and he has no business to apply a policy just because it is a popular one. Policy considerations may, in the course of the judicial process, have to be applied, but the popularity of the policy is irrelevant. Indeed, it may happen that the court's duty is to stand firm against popular clamour, just as the court may, on occasion, have to stand firm against the claims of the Government. A judge who is worth his salt should be able to ignore what the community, or some section of it, is telling him to do. In the Thalidomide case the House of Lords thought otherwise, holding that for a newspaper to argue, in the appellate stage of the case, when there was no question of a jury's verdict being affected, that the defendant's conduct amounted to negligence, was contempt of court, that being the very question which the court had yet to decide. With respect, I hope that is not the law in Australia. I agree that the judge's job may be made more difficult by public expression of opinion on an issue which is before him for decision, but the judge is armed with training, tradition, independence - surely he should be able to surmount the difficulty.

So, in this last part of the twentieth century, where do the courts stand in the community? I believe that I can venture on some conclusions from what I have been trying to say.

First, just as society has become more complex, and more subject to stresses and strains, so the work of the courts - and, I would specially add, the job of the judge - has become more difficult, requiring a higher standard of professional competence. I mean "professional competence" in the widest sense; knowledge of the law is an enormously important part of it, but not everything. For myself, I am delighted to have retired, so that the burden of coping with the increasing difficulty of the job, and achieving a higher standard, no
longer rests on me. I regard the judges who are serving now, and the members of the profession who assist them, and will provide their successors, with the deepest respect and confidence.

Secondly, the community must have, and show, an understanding of the courts and their function in the frame-work of society, and great efforts must be made by all concerned to assist in the achievement of this understanding. To achieve that aim, I make a special appeal to two sections of the community. One is the legal profession, and its embodiment, the Law Society. The other is the media, and in particular the Press. To the latter I say - you must inevitably play a major part in forming the community's appreciation, be it favourable or not, of the courts. Criticize, stimulate, entertain - it is your job and your right - and also, I respectfully request, understand and be informed, and pass on your understanding and information.