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MACQUARIE UNIVERSITY LAW SCHOOL

40TH ANNIVERSARY

SYDNEY, 19 OCTOBER 2012

A.R. BLACKSHIELD AND REALISM IN
AUSTRALIAN CONSTITUTIONAL LAW

The Hon. Michael Kirby AC, CMG

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THE HON MICHAEL KIRBY AC CMG**

IN THE BEGINNING

As befits a pupil, I honour a teacher who helped to ready me for a life in the law. He helped me to see law, especially public and constitutional law, in its governmental and political context. He was one of the early professors of law at the Macquarie University Law School. But before that, in his first years of undergraduate teaching at the University of Sydney Law School, he taught a class that included Murray Gleeson, David Hodgson, Graham Hill, Jane Matthews, Brian Tamberlin, me and others.

In Professor Blackshield's hands were placed two future Justices of the High Court of Australia, judges of the New South Wales Court of Appeal and of the Federal Court and other Federal and State courts, two future professors of law, leading businessmen, politicians and legal practitioners.¹ Great is the responsibility of the teachers who introduce untutored law students to the concepts of law that will dominate their lives, so important for their society. Great is the debt that we, the students owe to our teachers, including Tony Blackshield.

* Inaugural Tony Blackshield Lecture, 2012.

** Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-1996); Judge of the Federal Court of Australia (1983-84); Chairman of the Australian Law Reform Commission (1975-84). Chancellor of Macquarie University (1983-92). The author acknowledges the comments of an anonymous reviewer which have been reflected in the text.

¹ The story is told in M.D. Kirby, "The Graduating Class of Sydney Law School 1962 – Talented, Lucky, Unquestioning" (2012) 36 *Australian Bar Review*, 189.

Anthony Roland Blackshield was born on 25 February 1937 in Wagga Wagga, New South Wales. He was the son of Charles and Constance Blackshield. They were teachers for the New South Wales Department of Education, committed to the three great principles of public education that had been embraced in Australia, continent-wide, in the 1880s. It should be free, compulsory and secular.² Charles Blackshield taught in primary schools. His duties took him, his wife and family to school postings in Molong and Bathurst and then to Nimbin, New South Wales, his first appointment as headmaster. Later he was headmaster at Abermain, Cabramatta, Auburn North, Neutral Bay and Manly. When, thinking I had caught Professor Blackshield in a rare slip of gender incorrectness in acknowledging only his father's name in *Who's Who in Australia*, a fault not uncommon in earlier days, he pointed out that each of his parents had the initial "C". For him, designating that initial referred to each of them, equally. Inferentially, he was already conscious of the word count.

What a different country Australia was at the time of Tony Blackshield's birth. The Governor-General was, once again, a member of the English nobility. General the Right Hon. Alexander Gore Hore-Ruthven, Baron Gowrie had assumed office in 1936, replacing the first Australian-born Governor-General, Sir Isaac Isaacs. Lord Gowrie had previously served for a time as Governor of New South Wales. Upon his elevation to Governor-General, he was replaced in the later office by Captain, the Right Hon. John Loder, Baron Wakehurst. The best selling law book at the time of Tony Blackshield's birth, written by the scholarly Justice of the High Court, Herbert Vere Evatt, was *The King and His Dominion Governors*.³ The reserve powers of the Crown were thought to be in safe hands when they rested with friends of the King. The monarch, King George V, as King-Emperor, had just celebrated with Queen Mary his Silver Jubilee. The Australian Prime Minister of the day was Joseph Aloysius Lyons, originally a member of the Australian Labor Party (ALP), but by then leading the Nationalists after a close fought federal election in October 1937. The Chief Justice of the High Court of Australia was Sir John Latham, formerly Lyons's able and loyal deputy. He had been elevated to the post of Chief Justice, with

² In New South Wales by the *Public Instruction Act* of 1880 (Act 43, Vic. No. 23) (NSW). There was an earlier *Public Schools Act* of 1867, repealed and replaced in 1880. Similar moves happened throughout the Australian colony.

³ H.V. Evatt, *The King and His Dominion Governors* (1936), reprinted Frank Cass and Co, London, 2nd Ed., 1967.

gratitude for his loyalty, in 1935. Australia's vulnerability in a world of German and Japanese militarism was at last acknowledged in 1937 by the inauguration of the post of Australian counsellor at the British Embassy in Washington. Latham was soon to be called back from the High Court to a diplomatic mission to Japan, aimed to avoid war. It was to prove fruitless. Latham's distinguished colleague, Mr Justice Owen Dixon, was in April 1942 to take up the post of Minister in Washington, at the time of Australia's greatest existential peril.

Tony Blackshield grew up, as I did, during the period of wartime and post war austerity in Australia. Repeatedly, he was dux of the regional public schools that he attended. This would have assured his entry in 1949 to Maitland Boys' High School, a selective school; but in any event by that time Charles Blackshield was headmaster at Abermain and the family were living in Maitland. At High School too Tony Blackshield emerged as the top student of his year. In his graduating class he was one of five professors. He matriculated to the University of Sydney, then offering the only undergraduate law course in New South Wales. He enrolled for the five year course which could be performed part-time concurrently with articles of clerkship. He undertook articles in a small legal firm with offices in Martin Place, Sydney. His principal solicitor was C. Don Service. Like other law students of his day, Tony Blackshield took his lectures in Phillip Street, Sydney, rushing to and from them to fulfil the urgent demands of his master solicitor.⁴

Tony Blackshield completed his Bachelor of Laws degree in 1959. The pass degree was conferred on him in 1960 by the ancient Chancellor of the University of Sydney, Sir Charles Bickerton-Blackburn. By the year of his graduation, Australia was half-way through 23 years of Coalition federal government. There had been an almost equal interval of Labor Government in New South Wales. Australia was a land increasingly open to non-British, European migration, witnessing rising prosperity. However, it was socially homogenous, unquestioning and afflicted by serious discrimination against women and minorities.⁵ Like his parents, Tony Blackshield foresaw a future for himself as a teacher. It was at this point that he became the

⁴ Described in Kirby, above n. 1 at 192.

⁵ Ibid, at 200.

beneficiary of the well-judged support of one of his own law teachers, the remarkable and influential Professor Julius Stone.

STONE'S JURISPRUDENCE

Julius Stone had come to the Sydney Law School in 1942 from Oxford via Auckland. In Sydney he was appointed Challis Professor of Jurisprudence and International Law. It was Blackshield's good fortune that he caught the eye of Stone, ever on the lookout for talented undergraduates to act as research officers to help him with his steady flow of legal writings on the subjects of his specialty. Tony Blackshield's undergraduate course had not been as distinguished as his school results had promised. But this mattered not to Stone, who saw in the gangling youth a sharp native intellect and a talent for original thinking that was not universal amongst law students of that time. Especially unusual in the era of positivist legal formalism, advocated by Sir Owen Dixon, by now in his last years of service as Chief Justice of the High Court of Australia. It was on his swearing in into that office in 1964 that Dixon had declared, famously:⁶

“... [C]lose adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.”

Stone's own thinking had been, influenced by great legal scholars in the United States, including Roscoe Pound and other realists who taught that this superficially attractive Dixonian instruction tended to disguise the real characteristics of the judicial method. For Stone, judges inescapably faced “leeways for choice” in the ambiguities of constitutional and statutory language and in the process of analogous reasoning from past common law precedents, decided upon necessarily different facts⁷. The young Blackshield was fascinated by Stone's theory, so central to the

⁶ Sir Owen Dixon, Retirement of the Chief Justice, (1964) 110 CLR v. See also M.D. Kirby, *The Judges* (Boyer Lectures 1983) Sydney, ABC.

⁷ The theory of “leeways for choice” was repeatedly propounded by Stone, influenced by Professor Karl Llewellyn. J. Stone, *Social Dimensions of Law and Justice* (Maitland, Sydney, 1966) 648-649.

idea of what the leading actors in the legal drama – the judges – actually did. Perhaps his upbringing in modest circumstances, in public schools and in regional and rural Australia, made him more open to Stone's instruction than most of his fellow law students of the time, deriving from wealthy parents and private school education, more willing to accept unquestioningly the orthodox mythology.

Stone's teaching was mildly shocking for many lawyers of the middle 1960s. This was so because of the great respect in which Dixon was held both nationally and internationally. In Blackshield, Stone had found a researcher who was not reluctant to scrutinise the orthodoxy and to subject it to critical and sometimes sharp, analysis.

So it was that Tony Blackshield was recruited by Julius Stone as a part-time research assistant. In this way his career as a legal academic began. He worked in the tiny set of offices on the third level of University Chambers in Phillip Street, Sydney, where Stone, ever surrounded by the aroma and smoke of his pipe, was protected from too many student intrusions by his executive assistant, Ms Zena Sachs. For Australians in an age of monochrome racial and social uniformity the Department of Jurisprudence and International Law at the Sydney Law School was exotic. Other teachers inhabiting the confined space were Ilmar Tammelo, then a reader in law, and Charles Alexandrowicz competing with a young Upendra Baxi and Stone's burgeoning library for a space to sit. There was a constant stream of international visitors, including Ivanhoe Tebaldeschi and Giovanni Tarello from Italy, and Gyhan Sharma from India. It was into this special environment that Tony Blackshield entered with his characteristic excited vigour and optimism.

His timing could not have been better. Stone was in constant demand to give lectures, and to accept visiting professorships, overseas, particularly in the United States of America. His absences from the Sydney Law School created opportunities for the young Tony Blackshield to act as tutor and then a junior lecturer for the bright-eyed under-graduates. Moreover, it opened the door to a more active role in an organisation that Stone had embraced to promote local debates about legal philosophy. The organisation was the *Internationale Vereinigung Für Rechts-und Sozialphilosophie* (IVR). This was a German based organisation whose journal, or *Archiv*, was founded in 1907. To breathe life into the organisation, a local branch

had been established, the Australian Society for Legal Philosophy (ASLP). The ASLP is still active and I recently participated in their conference at the Melbourne Law School. Coincidentally, it was presided over by Stone's granddaughter, Professor Adrienne Stone⁸. Meetings of the ASLP were held in the North Shore homes of Julius Stone and Ilmar Tammelo. Blackshield and I attended. He always seemed to understand and enjoy the abstruse philosophical exchanges. Prudent silence was my mask when I felt out of my depth, as I did most of the time.

In 1963 an issue of the *Archiv* of IVR was devoted to contributions by members of the ASLP. On this occasion I shared the privilege with Stone, Blackshield, Geoffrey Sawyer, David Derham and others. Blackshield's article addressed "Some approaches and barriers to the definition of law"⁹. My own contribution was on "Dialectics and Law"¹⁰. It was the first essay of mine in a law journal. For both Blackshield and me, many were to follow¹¹.

My topic of dialectics grew out of research I had performed for Stone in conjunction with his decision to update his masterpiece *The Province and Function of Law*¹². He elected to do this in three "successor volumes". The first, published in 1964, was titled *Legal System and Lawyers' Reasonings*. This isolated and examined Stone's thought about the legal and judicial system and the materials and techniques that lawyers and judges used to perform their daily work. In Stone's acknowledgements, he singled out "Mr Anthony Blackshield, LL.B", designated his "Senior Research Assistant". He thanked him, first for his research work over the previous three years and then for making "many helpful criticisms and suggestions". He went on to say:¹³

"During this time Mr Blackshield moved from his novitiate into authorship of able independent papers arising from this research, published on his own account, which have already been of service in the present project. It is gratifying that training in the

⁸ M.D. Kirby and J. Allan, "A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Hon. Michael Kirby" (2009) 33 *Melbourne University Law Review*, 1032.

⁹ A.R. Blackshield (1963) 39 *Archiv Für Rechts-und Sozialphilosophie*. 35.

¹⁰ *Ibid*, at 91.

¹¹ Russell Smyth "Who Publishes in Australian Law Journals" (2012) 35 UNSW 201.

¹² Maitland Publications, Sydney 1946.

¹³ J. Stone, *Legal System and Lawyers' Reasonings* (Maitland, Sydney, 1964), vii.

course of the present work should have contributed to a scholarly endowment which promises him a notable place in the oncoming generation of jurisprudential thinkers.”

The second volume in the series was *Human Law and Human Justice*¹⁴. This explored the legal, social and economic contexts from which the ideals of human justice had developed. Stone dedicated the work to his graduate assistant, Zena Sachs, herself a law graduate. He acknowledged Blackshield again in the first paragraph¹⁵. Specifically, he declared that he had “provided provocative and fruitful suggestions and materials for the sections on the medieval transmissions of notions of justice... and for a number of [other] sections... where he read and criticised the rest of the MS.”¹⁶

Finally, in October 1965 came the largest volume in the successor series, *Social Dimensions of Law and Justice*¹⁷. Once again he thanked Blackshield, by now a “Lecturer in my Department” for his “admirably penetrating criticisms and suggestions”. Stone also made reference to my own research assistance on his treatment in law in the then Soviet Union. I had “gathered and organised much material for the first draft of Chapter 10 on Soviet-Marxist views about the withering away of the State”. He went on: “Though he will probably not agree with the themes and conclusions which there emerged, the clash of ideas with him during writing was an invaluable prod”. These were modest thanks for countless hours spent reading tedious English language translations afforded to me by Dr Tammelo, containing speeches to the Soviet assemblies by Stalin, Malenkov, Bulgarin, and Khrushchev. To me, some of these Soviet politicians appeared to be as uncertain of their bearings in legal philosophy as I had been at the ASLP meetings. However, they lacked the prudence, or possibility, of silence. Shortly, I was to turn my ordeal to advantage, selecting the Marxist theory of the withering away of the State under Communism as the research topic for my LL.M research thesis. None of us had the foresight then to realise that the Soviet State would indeed wither away; but not in the manner that Stalin and his comrades had predicted.

¹⁴ Maitland, Sydney, January 1965.

¹⁵ Ibid, vii.

¹⁶ Loc. cit.

¹⁷ Maitland, Sydney, 1966, vii.

To secure my master's degree in Law, in the newly introduced course work, I also undertook two subjects, taught by Tony Blackshield and Don Harding. One of these took me into a subject that, I was to discover, was very close to Blackshield's heart. This was an empirical/analytical approach to judicial decision making, utilising a measurement technique known as scalograms. This was a methodology developed in a new branch of jurisprudence called "jurimetrics". It had first been postulated in the United States by Lee Loevinger in the 1940s. It became more popular in the 1960s when it spread to Australia, in part as a result of writings by the American scholar, Glendon Schubert¹⁸. Schubert turned his mathematical and analytical skills to an analysis of judicial decision-making in the High Court of Australia¹⁹. His work was picked up in Australia by Tony Blackshield²⁰ and Alan Tyree²¹.

Needless to say, the application of jurimetrics to the decision-making of the Justices of the High Court of Australia was not popular in many quarters. It was condemned as focusing primarily on outcomes and not on reasoning; of addressing the courts' orders and not all of the doctrine and learned discourse that had preceded the dispositions, and resulted in those orders. Obviously, the doctrine and the reasoning were very important to the judges and the legal community. But from the point of view of the litigants (and quite frequently the community, the media and the governmental process) the orders constituted the most important product of the process. The judicial reasons were sometimes extremely long and occasionally impenetrable. The orders were typically short and, for the winner, sweet.

Moreover, the patterns that this form of analysis demonstrated, in the recurring outcomes of judicial reasoning, tended to lend weight to the propositions, expressed in general terms, by the modified realist schools of jurisprudence embraced by Pound and Stone. Whatever the doctrinal differences, they tended to demonstrate

¹⁸ G. Schubert, *The Judicial Mind*, 1965. This followed earlier studies by Fred Kort, "Predicting Supreme Court Decisions Mathematically" 51 *American Political Science Review* 1 (1957); F. Kort, "Simultaneous Equations and Boolean Algebra in the Analysis of Judicial Decisions", 28 *Law and Contemporary Problems*, 143 (1963).

¹⁹ G. Schubert, "Judicial Attitudes and Policy-Making in the Dixon Court" (1969) 7 *Osgoode Hall Law Journal*, 1; G. Schubert, "Political Ideology on the High Court" (1968), 3 *Politics* 21. See also T. Blackshield, M Coper and G. Williams, *The Oxford Companion to the High Court of Australia* (OUP, Melbourne, 2001), entry by T. Blackshield "Jurimetrics", *ibid*, 381.

²⁰ A.R. Blackshield, "Quantitative Analysis: The High Court of Australia, 1964-1969" (1972) 3 *Lawasia* 1.

²¹ A. Tyree, "the Geometry of Case law" (1977) 4 *Victoria University of Wellington Law Review* 403; A. Tyree, "Fact Content Analysis of Case law: Methods and Limitations" (1981), 22 *Jurimetrics Journal* 1.

that judges had fairly consistent patterns of decision-making. In effect, jurimetrics provided sustenance, and a measure of quantification and predictability, for common room gossip. That some judges were overall liberal and others legally conservative. That some tended to favour the tax commissioner and other the taxpayer. That some were hostile to plaintiffs and others were usually sympathetic to them. That some tended to favour the Crown and others the accused or citizen in a conflict between the state and the individual. To those lawyers who believed, and taught, that judicial reasoning was preordained by the application by pure logic and 'high technique' to legal texts and past decisions, the scalogram represented, potentially, a most troublesome challenge.

It was for this reason that Blackshield's lectures, both for the LL.M course and to the undergraduate classes during Stone's absences, greatly attracted a cohort of students, ever on the lookout for excessive professional self satisfaction and self deception. My brothers, who followed shortly behind me at the Sydney Law School, have reminded me of Blackshield's particular strength as a lecturer. He used few notes. He spoke with much detail. He was engaging. A good storyteller. And respectful of the judiciary but mildly iconoclastic. In the sombre world of Dixonian legalism, this was like a daily splash of ice cold water, thrown into the face of the orthodox.

For most of his professional career, Blackshield has continued to be so engaged. It did not take him long to drop the scalogram analysis. There was more professional future in analysing, and criticising judicial reasoning according to its own terms. But the basic approach he was to take as a scholar of constitutional and public law was born of his relationship with Stone, nurtured in the crucible of jurimetrics, stimulated by scalograms and weaned in his ensuing early years of law teaching.

EARLY CAREER

Blackshield's appointment as a lecturer in law at the University of Sydney exposed him to many bright students. But also to some of the tensions that existed between the common law scholars of distinction in the law school and the large cohort of

foreigners in Stone's *milieu*, amongst whom Blackshield stood out mostly because of his Australianness.

In 1964, Blackshield was appointed as a Visiting Associate Professor at the University of Virginia in the United States. In 1965, he began a long association with India as an associate of the Indian Law Institute in New Delhi. In 1969, in recognition of his heavy teaching load, he was promoted to senior lecturer in law.

At about the same time, he joined the Australian Reform Movement which later grew into the Australia Party and subsequently into the Australian Democrats. This unusual move showed distaste on his part for each of the major political groupings in Australia and a desire for the political (and perhaps legal) middle ground. In 1962, the University of New South Wales (earlier named the University of Technology) began planning for a second law school in Sydney. The planning took some time before, in October 1969, the University Council appointed a barrister, Mr J.H. Wooten QC, as the Foundation Professor and Dean of the Faculty of Law²². This was an unusual appointment by that time, coming as it did from outside the ranks of academe. It was to prove highly influential and beneficial. Wooten himself confessed that "the only thing I knew about legal education was how bad my own was" ²³. By inference, this was a reference to his legal education provided at the University of Sydney. It comprised, to that time, mostly very large classes, a large cohort of part-time practitioner lecturers; virtually an entirely compulsory (no options) curriculum, and little social life for the students. Most of the students were preoccupied with their work time duties as articled clerks. Legal studies took a second place.

Hal Wooten has described the process that led to Blackshield's selection as one of the "magnificent seven" ²⁴ who made up the initial staff of the new UNSW Law School: ²⁵

²² M. Dixon, *30 Up – The Story of the UNSW Law School 1971-2001*(UNSW, 2001), 2.

²³ *Ibid* loc. cit.

²⁴ An expression used by French C.J. in his address at the dinner of the UNSW Law School 40th Anniversary, 2012.

²⁵ Letter from Hal Wooten to the author, October 2012.

“As foundation Dean, my primary criterion for selecting the initial staff was that they should have the capacity to enthuse students for their legal studies. The powers that were in Sydney strongly recommended that I recruit two of their existing staff. One I knew to have problems with alcohol. The other, although expert in his subject, was known as perhaps the most boring exponent ever. I accordingly sought advice elsewhere – from students at Sydney Law School. The unanimous opinion conveyed to me was that the two most interesting lecturers were Garth Nettheim and Tony Blackshield. They became members of the staff for UNSW’s first year of operation”.

Blackshield served on the Faculty of Law of UNSW from 1971 to 1978. Initially he retained the rank of senior lecturer. Wooten was told he was “brilliant and thoroughly personable” and “a gem”²⁶. So he moved. He had hoped to teach both jurisprudence and constitutional law. However, this had not proved possible at the University of Sydney because constitutional law was allocated to the Department of Common Law and Jurisprudence belonged to Stone’s Department. Because Stone himself would be obliged to retire in two years time, Blackshield made his move. So did Nettheim, who was appointed a Professor of Law. The other Professor was Professor Curt Garbesi a gifted teacher of law. Richard Chisholm (later Professor and subsequently a Judge of the Family Court of Australia); Robert Hayes (later Associate Professor and an early Commissioner of the Australian Law Reform Commission), Michael Coper (later Professor and long time Dean of Law at the ANU) and Blackshield became the teachers with heavy workloads, operating out of initially primitive environments centred around the law library in “hut C”. It was a creative time in Blackshield’s professional life. A law school that depended on questioning and understanding; small group tutorials; and full-time academic staff had emerged to challenge the rote learning big class tradition of Sydney University. It was to become a healthy competition between the institutions.

It was at this time that Blackshield increased his engagement with the Australia Party. This took him to protests about such issues as the treatment of Aboriginals in Australia; the position of women; censorship; and general police hostility to civil liberties. I know these things because, coinciding with Blackshield’s engagement

²⁶ Dixon, above n. 22, 8.

with the Australia Party, I was serving as a busy member of the committee of the New South Wales Council for Civil Liberties.²⁷ These were activities that were to bring both of us into contact with the realities of law in the streets. In my case this included Aboriginal advancement in Walgett; civic protests against the Vietnam War and compulsory military service; activities to terminate White Australia and to uphold the rights of peaceful demonstration of alternative view points.

Blackshield's activities brought him into contact with a young UNSW student, Wendy Bacon, later herself to be an academic. She had published the third issue of a mock edition of the student newspaper, which she called *Thorunka*. This contained material deemed obscene by New South Wales police. Following a jury trial that led to her conviction, Blackshield turned up outside the court to sell copies of the magazine the morning when she was due to be sentenced. Although he did not see any literary worth in the content of *Thorunka*, he condemned the prosecution. While he was waiting outside the court, a passerby thrust into his hand a publication condemning the trial judge (Judge David Hicks). Blackshield put this paper under his arm. He was subsequently arrested both for selling the condemned issue of *Thorunka* and for distributing an obscene attack on the Judge. His arrest caused something of a sensation at UNSW. Certainly, nothing like it had happened to any known lecturer at the University of Sydney Law School. The situation was complicated still further because, while awaiting the outcome of Ms Bacon's sentencing hearing, three media releases were prepared in Blackshield's name. One, highly critical of Judge Hicks, was only intended to be released if the sentence turned out to be unfair; which it was not. In the result, the wrong release was issued. Blackshield faced the possibility of yet another charge, then much more common than now, of contempt of court. In the end, taking Dean Wootten's advice, Blackshield wrote a personal letter of explanation and apology to the Judge. Wisely, Judge Hicks decided that no action should be taken on that score. But that left the two original charges outstanding²⁸.

²⁷ A.J. Brown, *Michael Kirby- Paradoxes/Principles* (Federation, Sydney, 2011), 69-70, 166-175.

²⁸ A.R. Blackshield, "The Wendy Bacon Case", unpublished address to the Australia Party Tuesday Club, 15 February 1970.

The police charges against Blackshield for publishing obscene matter were defended by a young barrister, Mary Gaudron, later to be a Judge, Solicitor-General and a Justice of the High Court of Australia. She drafted a letter that was sent by Blackshield's lawyer to the New South Wales Attorney-General suggesting that he should file a *Nolle Prosequi* in respect of the charges. This was agreed in relation to the pamphlet. However, the charge arising from the sale of *Thorunka* stood. After the relevant law was amended, Mary Gaudron proposed a further letter to the new Attorney-General. This resulted in the dropping of the second charge. In the result, the young academic emerged from his travails with authority and without the blemish of a criminal conviction²⁹.

Years later, Hal Wootten commented that those familiar with Blackshield's later day *gravitas* would be astonished by his youthful engagements and his "much more controversial character"³⁰ in those days. No doubt these experiences, in the new environment of UNSW Law School, sharpened Blackshield's interest in law as an instrument of social policy and, occasionally of oppression. It added to the fund of anecdotes that always brightened his lectures and public comments. His engagement with politics diminished after the election of the Whitlam Government in December 1972. He then had a great wave of law reform to consider. Subsequent changes in the personnel and decisions of the High Court of Australia made his analysis of its decisions more exciting and purposeful³¹.

PROFESSOR AT LAST

In 1979, Blackshield took a career move sideways, accepting appointment as Professor in the Department of Legal Studies, within the School of Social Sciences at the new La Trobe University in Melbourne. Although Law at UNSW had injected a social values component, it was still bound by the professional curriculum to follow instruction in law in the books. La Trobe University involved teaching legal studies to

²⁹ P. Burton, *From Moree to Mabo: The Mary Gaudron Story* (UWA Publishing, Perth, 2010), 87-88; D.S. Campbell, *The Liberating of Lady Chatterley* (NSW Council for Civil Liberties, 2007), 32-33.

³⁰ H. Wootten, note to the author, 'Recollections of 1971-3'.

³¹ He published several works on the ordeal of Justice Murphy: see D. Brown, Michael Coper and R. Krever, *The Judgments of Justice Lionel Murphy* (Primavera Press, 1986). See D. Brown, A.R. Blackshield, "The Murphy Affair" in J. Schutt (Ed.), *Lionel Murphy, A Radical Judge* (McCulloch Publishing, Melbourne, 1987), 230; M. Coper and G. Williams A.R. Blackshield, "Lionel Murphy and Judicial Method" in M. Coper and G. Williams (Eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation, Sydney, 1997), 224; A.R. Blackshield, "Lionel Murphy: Return to the Court" (1986) 76 *Arena*, 28.

non-lawyers. It therefore obliged Blackshield to stand outside the discipline he had made his own and to view law, uniformly, from a new and different perspective.

There was some speculation at UNSW as to why he would make this move. In 1971 he had seen his colleague Garth Nettheim promoted to Professor but by 1978, the same rank had not come to him, although in 1974 he was appointed Associate Professor. La Trobe offered him professorial appointment. But it also provided an opportunity to study and teach the law from new view points. One of these was a matter he had recognised as having increasing importance for the Australian community, namely the long neglected relationship of the law to the indigenous communities. He also began to pay an increasing attention to the processes of legal change and the institutional mechanisms for law reform that had been established during the short Whitlam Government³². He began to write extensively on the High Court of Australia as a governmental institution³³. He was a strong proponent of the termination of Privy Council appeals³⁴. He helped to edit the *Festschrift* for Julius Stone, to which I also contributed³⁵. He pursued his long interest in the meaning of justice and the role of values and morality in the law³⁶. He took up his pen to write many letters to the editor and newspaper columns. In short, he became a public intellectual, commenting seriously, but critically, on the law and its institutions and personalities³⁷. Consistently with his interests, he took as his theme for his inaugural lecture at La Trobe University “the Revolt Against Legal Formalism”³⁸.

In 1988 Blackshield accepted an appointment to return to Sydney as one of the early Professors of Law at Macquarie University. He was immediately popular with his students. He was also specially valued by his colleagues because of strong divisions that had emerged in the school which (to simplify things) divided

³² A.R. Blackshield, “Law Reform” in H. Emy, O. Hughes and R. Mathews, (eds) *Whitlam Revisited: Policy Directions, Policies and Outcomes* (1993), 97.

³³ A.R. Blackshield, “The High Court: Change and Decay” (1980), 5 *Legal Services Bulletin*, 107.

³⁴ A.R. Blackshield, “The Last of England: Farewell to Their Lordships Forever”, *Law Institute Journal* (Vic), October 1982, 779.

³⁵ A.R. Blackshield (Ed.), *Legal Change: Essays in Honour of Julius Stone* (Butterworths, Sydney, 1983).

³⁶ A.R. Blackshield “The Hart – Devlin Controversy in 1965” A Review of Patrick Devlin, *The Enforcement of Morals*, (1965) and H.L.A. Hart, *the Morality of the Criminal Law*, (1965) in (1967) 5 *Sydney Law Review*, 441.

³⁷ A.R. Blackshield, “Barwick – Great and Vague Powers”: a review of David Marr, *Barwick* (1980) in *Australian Book Review* (No. 21, June 1980), 1, 3-5; “A Pugnacious Competent” : A Review of Sir Garfield Barwick, *a Radical Tory* (1995) in *The Weekend Australian*, 15 July 1977, 7.

³⁸ La Trobe University, 1979.

traditionalists and formalists, on the one hand, from legal realists and advocates of critical legal studies, on the other. His already established reputation as a fine constitutional lawyer stood him in good stead with the former group. His track record as an “intrepid intellectual whose public comment on current issues is clear, critical and authoritative”³⁹ endeared him to the latter.

One of his early pupils at Macquarie Law School was George Williams (class of 1992), later a professor at UNSW. He recounted the fact that Blackshield was “the only teacher I ever had who would regularly give students over 100 pages of reading per two hour class... He found even the constraint of 100 or more pages too difficult and would divide the pages into two columns with a very small font”. For all that, the classes were “greatly enjoyed”. Essays would be returned “with a mountain of red ink all over them”. “He was the only teacher who would mark papers at a greater length than in the papers themselves.” This habit led to suggestions that he too needed a word limit⁴⁰. Williams assessed Blackshield’s impact as producing amongst his students “a passion for constitutional law and for reform of that system.”⁴¹ Williams saw his greatest strength as a teacher in his ability to move effortlessly from theory to detailed case analysis adding all the time amusing anecdotes.

Other students at Macquarie University praised his way of making constitutional law “come alive, taking its place amidst the vortex of politics and history”⁴². He became known as “the singing professor”. This *sobriquet* was earned by an outstandingly popular series of anniversary law dinners that he inaugurated that were illuminated by a song chosen by, and with words penned by, Blackshield himself. Because during the 1980s, I was elected to serve as Chancellor of Macquarie University, it was my privilege to attend many such dinners. I recall that the former Chancellor of Macquarie University and High Court Chief Justice, Sir Garfield Barwick, also attended at least one of these dinners. Barwick appeared to enjoy greatly the *Engineers Case Song*, mainly (I suspect) because he was always a passionate

³⁹ *Flashback*, Emeritus Professor Tony Blackshield, *Macquarie University Law School Alumni Book*, 2000, 150. See also R.F. Croucher and J. Shedden (eds) *Retro 30 Years of Macquarie Law 1975-2005*, Macquarie University, 2005, 150-151.

⁴⁰ *Ibid.*

⁴¹ *Loc. cit.*

⁴² Dr Margaret Kelly *Loc. cit.*

advocate for the principle established in that case⁴³. It was a principle that greatly favoured the expansion of the legislative powers of the Federal Parliament at the cost of the States⁴⁴.

Blackshield's years of service at Macquarie Law School were not without moments of pain. The disputes between the individuals and factions in the School were often highly personal and sometimes unpleasant. In his book on the early history of Macquarie University, Professor Bruce Mansfield and Mr Mark Hutchison described the point which had been reached soon after Blackshield's arrival:⁴⁵

“Agitation in the School arrived after a more settled and constructive period under the calming leadership of A.R. Blackshield as Acting Head. The School passed a vote of no confidence in [Professor Dennis] Ong, and the staff association objected to his reinstatement. There appeared the childish manifestations, offensive hand bills and posters, that had accompanied the earlier troubles in the School. The daily press was generally hostile to the University administration and reflected the views of the more alienated members of the traditional group, Ong's supporters. A one-sided treatment turned, in the hands of some columnists and education journalists, into a campaign, at time personal and malicious.”

The University Council and leadership laboured long and hard over the divisions. Ultimately, Professor Ong gave up and resigned as Head of School. According to Mansfield and Hutchinson:⁴⁶

“In his first period as Acting Head (January-July 1989), Tony Blackshield had put forward a ‘positively Herculean effort’ to restore normal functioning and consultative processes and to move the School away from past obsessions, in the faith that in time the School's reputation would be restored in the legal fraternity’. The final ‘Response’ to the Pearce Report [on the future of the School], written by Blackshield and [Vice-Chancellor Di] Yerbury and submitted during that period (May 1999) had a

⁴³ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)*, (1920) 28 CLR 129 at 151-52.

⁴⁴ Barwick C.J. referred to this in his farewell remarks as Chief Justice: (1981) 148 CLR v, at ix-x.

⁴⁵ B. Mansfield and M. Hutchinson, *Liberality of Opportunity: A History of Macquarie University 1964-1989*, Macquarie Uni/Hale & Iremonger, Sydney, 1992, 310.

⁴⁶ *Ibid.*

strongly positive tone. It properly castigated the ‘false dichotomy’ between the traditional and the critical and contended, somewhat optimistically, that the difference and even the opposed understandings of ‘law in context’ at Macquarie, were ‘integrated into an overall curriculum plan’ in a systematic way.

A calmer period followed. To it the singing professor with his enthusiastic and eclectic personality contributed to the slow process of healing. He illustrated the role that generous personalities can play, by their actions and behaviour, in promoting inclusiveness in legal institutions. Such institutions are often divided by strongly held opinions, traceable to deep differences about the idea of law and its place in society.

It was during the Macquarie years that Blackshield turned his attention to the writing of his important text (with George Williams), *Australian Constitutional Law and Theory: Commentary and Materials*⁴⁷. This is a major tome, made the stronger because it contains, under accessible conceptual headings, all of the major decisions of the High Court of Australia still having authority. The authentic voices of the judges are encapsulated in substantial abstracts. But there are added comments, side references and criticisms to illuminate the path of the student. Because of the great mass of detail in constitutional law, it was helpful to me as a judge, in exploring the development of constitutional doctrine, to resort to this text. Great care had been paid by the authors in extracting key passages from majority (and sometimes from dissenting) opinions. These are invaluable as gate-openers to the way in which different developments in constitutional discourse have emerged. Rightly, the book is extremely popular. A fifth edition was published in 2010. Although Blackshield protests that it will be his last, I hope that this is not so. Whatever happens, the authors should resolve to avoid the fate of the standard work on the Indian *Constitution* whose author, H.M. Seervai, mandated by his will that it should not be updated following his death⁴⁸. Blackshield and Williams has won a permanent place in the Australian constitutional discourse and should long survive its original authors.

⁴⁷ 1st Edition 1998 (Federation Press, Sydney).

⁴⁸ H. M Seervai, *The Constitutional Law of India* (4th Ed., 2008).

On his departure from Macquarie Law School the singing professor penned what he called a “Swan Song”. Sung to the tune “If I were a Bell” it reads:⁴⁹

I'll be doing no more Constitutional Law and Theory!
The reports of the courts had me all out of sorts and dreary,
When the High Court couldn't agree
And divided four against three,
The moment I saw it I knew,
There'd be seven,
Different
Points of view!

Ask me how do I feel now the fifth edition is over:
Well, all I can say is I feel like I'm dancing in clover!
I was weary and bleary but now from theory I'm free –
So I'm cheery now, 'cause it's cheerio from me!

Whilst several of the earlier songs had greater content and told, with exquisite accuracy, a complex and evolving story of constitutional doctrine with remarkable brevity, the last song portrayed for the first time the melancholy of age.

POST SWAN SONG AND CONCLUSIONS

Despite the promise of retirement, the stage door of life does not come easily to persons of Blackshield's generation. In 1997 he was appointed an Honorary Professor of the Indian Law Institute. In 1999, after Macquarie University named him a professor emeritus, he returned to UNSW as a Visiting Professor of Law. In the book “30 Up” his return to UNSW is celebrated with satisfaction as “one of the quietly most reassuring things” that could be said about that Law School. The historian records that, on his earlier retirement from UNSW, he had been “a bit disillusioned”. But on his return he saw that a lot of the original vision to which he had contributed,

⁴⁹ Words by Tony Blackshield, music by Frank Loesser (from the 1950 musical *Guys and Dolls*). Note that most of the songs were adapted to popular music of the 1950s-70s but with a range suitable to the limits of the Singing Professor's vocal chords..

had survived ‘– it is still broad and open in its approach to legal education’⁵⁰. And that was a goal of Blackshield throughout his life as a teacher of law.

In addition to his adjunct professorship at UNSW, the same rank was later conferred on him by Macquarie University and by the ANU. Working at UNSW and ANU, he helped to produce the *Oxford Companion to the High Court of Australia*⁵¹. First published in 2001, this compendium of excellent articles was duly published in time for the centenary of the Court in 2003. Blackshield, typically enough, wrote more entries than any other contributor. They ranged from biographical entries on several Justices (Deane, Fullagar, Jacobs, the Knox Court and the Murphy affair) to entries on cases, concepts and anecdotal matters, such as judicial reasoning and legal realism. Needless to say, some of the cases that gave birth to his songs are written up with enthusiasm by Blackshield (*Engineers Case; Melbourne Corporation; and Tasmanian Dam Case*).

The task of marshalling 230 authors, mostly writing on their specialties, to contribute to a book that is accurate, insightful and readable, demanded congenial personalities at the helm. Blackshield, with Michael Coper (ANU) and George Williams (UNSW), fitted the bill. It must be hoped that they, or successors, will write updates. Two of the topic authors were themselves later appointed as Justices of the Court (Heydon J. and Gageler J.) and one of these retired in February 2013 (Heydon J). It would be a tragedy if this useful collection became no more than a time capsule limited by writings collected up to late 2000.

Later lectures in this series named for Professor Blackshield will dig deeper into his legal writings; his theories of constitutional law; his criticisms of current and past doctrines; and his insights about the future. But first, it is necessary to record his life’s journey which happily is continuing. In that journey, I have not intruded needlessly into his personal life. His first marriage in February 1964 to Leonie Ramsay produced his son Simon, now a native title lawyer in Western Australia. Simon’s son Efrem, himself now a law graduate, was able to attend this lecture. I am glad he has heard of the affection, respect and influence that his grandfather’s

⁵⁰ M. Dixon (above n. 22) 106.

⁵¹ OUP, Melbourne, 2001.

professional life has won. Upon the dissolution of his first marriage, Professor Blackshield married Rosemary Huisman in 2002. She is herself a distinguished scholar and poet. In the past, at the Department of English in Sydney, where I learned much poetry in days gone by, I had the privilege to launch a book of her poetry. She and members of her family attended this lecture. I thank the Dean of Law at Macquarie Law School, Professor Natalie Klein, for inaugurating the lecture. Such master spirits of the law should be celebrated.

Indeed, the story of Tony Blackshield's life reveals why it is proper to remember and uphold his contribution to legal philosophy and constitutional law in Australia. It has been a long and faithful journey, effectively maintaining (although with many personal touches) the realist jurisprudence propounded by his mentor Julius Stone. Most of the pupils and teachers who came within the orbit of Stone's influence (although not all) were profoundly affected by it. Certainly, this was so if they could release their minds from capture by the traditional verbalist, formalist and positivist doctrines beloved of English jurists, advanced by Owen Dixon and still popular in Australia.

To this approach, like Stone, Blackshield brought a close discerning eye of textual analysis; an invocation of empirical scrutiny; and a sharp scepticism, unwilling to accept any proposition at face value just because a judge had stated it.

Even in recent times, Blackshield has been examining in sharp relief the emerging doctrines of final constitutional courts in connection with the relationship between national constitutional law and the busy world of international law, with which constitutional law must now somehow be reconciled. This is a subject that has interested me for many years and about which I have written, both in decisions of the High Court⁵² and in articles published in academic journals.⁵³ In one of his more recent essays, published significantly enough in India, Blackshield has also ventured

⁵² *Newcrest Mining Corporation v Commonwealth* (1998) 195 CLR 337, at 657-660 and in other cases.

⁵³ M.D. Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes" (1993), 16 *UNSW Law Journal*, 363; M.D. Kirby, "International Law – The Impact on National Constitutions" 21 *American University International Law Review*, 327 (2006).

upon this topic,⁵⁴ demonstrating that his mind is still open to new thinking on new issues. In this piece, he is especially critical of the opinion of Justice Michael McHugh, in the majority, in *Al-Kateb v Godwin*,⁵⁵ for suggesting that an immigration detainee might be detained indefinitely in the custody of the Australian federal executive by force of legislation and executive action, without any hope of judicial relief.

It is by actions not words that lawyers, including judges and scholars, are themselves ultimately judged. Although the decision in *Al-Kateb* still stands as law, later opinions and orders of the High Court of Australia suggest that one day the *Al-Kateb* principle will be overturned. Its advocates and defenders continue to suggest its correctness⁵⁶. However, the later reasoning of the Court suggests that it rests on a highly uncertain doctrinal foundation⁵⁷.

The field of constitutional law is peculiar in the legal taxonomy. More than virtually any other category of law's discipline, it deals with large concepts and many of these are (as Dixon himself acknowledged) political in the broad sense. A talent in interpreting a charterparty, a bill of sale or an insolvency statute is not necessarily the best (and certainly not the only) proper preparation for the great responsibility of interpreting and implying a nation's constitutional charter. In Australia, that responsibility devolves, ultimately, upon the seven Justices of the High Court. It is they who have the final word. At least they do so for a time, before any words that they have written are themselves overthrown or re-expressed by their successors.

It is in the context of this system of government and of its courts that a free nation needs the sharp minds of fine legal scholars. Working in law schools, they must of course, be respectful of basic doctrine, elucidated for their students in orthodox

⁵⁴ Tony Blackshield "National Constitutions in an International World" (2008) 2 *Indian Journal of Constitutional Law* 104. Blackshield is greatly respected in India as an influential scholar of Indian constitutional doctrine. See Madhav Khosla, *The Indian Constitution* (OUP, New Delhi, 2012) 182.

⁵⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562 (per McHugh J.) At 589-595; compare my own reasons at 622-629).

⁵⁶ *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 220-21 per Hayne J. And at 224-25 per Heydon J. By contrast, all opinions in the majority made reference to Canadian and European Court of Human rights decisions on prisoners voting cases. See also *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372.

⁵⁷ See *Plaintiff M47/2012 v Director-General of Security* (2012) 86 ALJR 1372 at 1403-04 ([114] ff, esp [119]-[120]) per Gummow J.

ways. They must instruct their pupils in the law as it is, derived by the application of the rules as they are. But they should also be quizzical, speculative, insightful and, where necessary, critical. It is with such values that our law students, and thus our future leaders in the legal profession and the judiciary, must be prepared for the never ending task of unveiling the mysteries of the Constitution.

For his contributions, in succession to Stone, to the minds of generations of lawyers, and for his gifts thereby to the citizens of Australia who live peacefully under their Constitution, I express one pupil's grateful thanks to Professor Tony Blackshield.⁵⁸

⁵⁸ Cf M.D. Kirby, "Afterword" in Sunil Khilnani, Vikram Raghavan and Arun K. Thiruvengadam, *Comparative Constitutionalism in South Asia*, OUP, New Delhi, 2013, 370 at 377.