



## Two Warnings and Some Encouragement

### Occasional Address

### St Paul's College of and within the University of Sydney

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1 I propose, tonight, to give two warnings and some encouragement.

(1) The warnings:

- Glittering prizes soon lose their glitter and come at a personal cost.
- Trying to make the world a better place often makes it very much worse.

(2) The encouragement:

- In the words of St Augustine: “Quod minimum, minimum est, sed in minimo fidelem esse, magnum est.”<sup>2</sup>

I know that I do not have to remind you that St Augustine of Hippo (as opposed, possibly, to St Augustine of Canterbury) did not speak or write English. So, if I am to use his words, they have to be in Latin. (For those who stay to the end, there will be a translation into English.)

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<sup>1</sup> President of the Civil and Administrative Tribunal of New South Wales; Judge of the Supreme Court of New South Wales. I would like to acknowledge the great assistance of my tipstaff, Justin Pen, in preparing this speech.

<sup>2</sup> “What is a little thing, is (just) a little thing. But to be faithful in a little thing is a great thing.” St. Augustine, *De Doctrina Christiana*, IV,35.

- 2 Studying law, what is the point of it all? Learning the legal principles and remembering the facts in long dead cases, construing statutes and understanding how to construe statutes, why would one do it?
- 3 Many law students and, indeed, many lawyers want, in one way or another, to achieve greatness. Many, even those who have been in practice for a long time, do not see the law merely as a job, a means of earning enough to pay the mortgage and the school and college fees, with a little left over. The law is more than that and it does seem to offer unparalleled opportunities to achieve greatness: by winning the glittering prizes; by being instrumental in making the world a better place; or even in some other way.
- 4 But, as with most opportunities in life, with the great opportunities offered by the law come great risks. Before embarking on the quest for greatness in the law, it is wise to consider what amounts to true greatness in a lawyer.
- 5 It is for these reasons that tonight there are both warnings and encouragement.

### **Glittering Prizes**

- 6 The first warning concerns pursuing law for the glittering prizes.
- 7 The expression “glittering prizes” is one used and exemplified by the exceptional English lawyer, F E Smith. In 1923, having ceased to be Lord Chancellor the previous year, F E Smith, by then Lord Birkenhead, with characteristic confidence proclaimed to the students of Glasgow University (the Warden’s alma mater):

“The world continues to offer glittering prizes to those who have stout hearts and sharp swords.”<sup>3</sup>
- 8 It apparently mattered not to Lord Birkenhead whether the sharp sword was a sword of steel or the two edged sword of the tongue. In Lord Birkenhead’s

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<sup>3</sup> Rectorial Address, Glasgow University, 7 November 1923.

case, his short military career in the First World War was less than spectacular. He was a liaison officer with the Indian Corps. During his few months of service, he discovered that the boxes of cigars that his wife, Margaret, sent him often failed to arrive at his quarters, which, as it happened, were a comfortable distance behind the front line. To combat the thievery, he had Margaret cover the boxes in brown paper and affix specially printed labels, which stated "Army Temperance Society Publication Series 9."<sup>4</sup>

- 9 The life of F E Smith does nothing if not demonstrate that the practice of the law offers the possibility of titles, honours, wealth and celebrity.
- 10 To deliver the warning concerning glittering prizes, F E Smith can speak for himself.
- 11 Smith became a barrister in 1899 and took silk in 1908 and within a couple of years he was earning more than £10,000 per year (according to the internet one would need a gross annual income of about £6 million in 2017 to have the equivalent purchasing power, or £12 million if Mr Corbyn becomes Prime Minister).
- 12 FE, as he was known, did not lack confidence as an advocate. Indeed, his approach to advocacy can be described as brave.<sup>5</sup>
- 13 On one occasion a judge complained about a long submission by Smith: "I've listened to you for an hour, Mr Smith, and I'm none wiser." The response was simple: "None the wiser, perhaps, my lord, but certainly better informed."
- 14 Another judge, perhaps understandably, was moved to say to him: "You are extremely offensive, young man!" Smith replied: "As a matter of fact we both are; and the only difference between us is that I am trying to be, and you cannot help it."

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<sup>4</sup> John Campbell, *F.E. Smith, First Earl of Birkenhead* (London: Jonathan Cape, 1983) p 388.

<sup>5</sup> These examples are taken from *F.E. : The Life of F. E. Smith First Earl of Birkenhead* (1933) by Frederick Second Earl of Birkenhead, 1959 edition, ch 9.

- 15 A County Court Judge, expressing a certain degree of frustration, asked him: “What do you suppose I am on the bench for?”

The response: “It is not for me, Your Honour, to attempt to fathom the inscrutable workings of Providence.”

- 16 F E Smith entered Parliament in 1906 and, after returning from his service with the Indian Corps, became Solicitor General, then Attorney General, during the First World War. In 1918, on being offered the appointment as Lord Chancellor of England, he asked: “Should I be drunk as a lord or sober as a judge?”<sup>6</sup> He appears to have embraced the absence of a doctrine of separation of powers in the English constitution. He took his seat on the Woolsack and accepted the accompanying title, becoming Baron Birkenhead of Birkenhead, the youngest Lord Chancellor since the infamous Judge Jeffreys in 1685. He went on to be created Viscount Birkenhead of Birkenhead in the County of Chester, in the 1921 Birthday Honours, then Viscount Furneaux of Charlton in the County of Northampton, and eventually Earl of Birkenhead a year later. Apparently, a title, once obtained, is not sufficient to satisfy the need for more.

- 17 To say that F E Smith loved the law would be a falsehood. In a reflective moment, he had told his friend, Lord Riddell: “I hate the Law; I am successful as a lawyer because I am a very clever man and can, therefore, grasp legal problems as most others would fail to do.”<sup>7</sup>

- 18 His ability and approach did not go unnoticed. Margot Asquith, socialite and authoress, as well as being the wife of the Prime Minister, H H Asquith, observed:

“Lord Birkenhead is very clever but sometimes his brains go to his head.”<sup>8</sup>

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<sup>6</sup> John Campbell, *F.E. Smith, First Earl of Birkenhead* (London: Jonathan Cape, 1983) p 469.

<sup>7</sup> Lord Riddell's War Diary 1914 – 1918 p 338

([https://archive.org/stream/in.ernet.dli.2015.208569/2015.208569.Lord-Riddells\\_djvu.txt](https://archive.org/stream/in.ernet.dli.2015.208569/2015.208569.Lord-Riddells_djvu.txt) accessed 11 July 2017)

<sup>8</sup> *The Listener* 11 June 1953 'Margot Oxford' by Lady Violet Bonham Carter.

- 19 Margot Asquith was not unknown for her acerbic wit. One story has her meeting the American film actress Jean Harlow and correcting Harlow's mispronunciation of her first name – "No, no; the 't' is silent, as in 'Harlow'."<sup>9</sup>
- 20 In addition to the titles, wealth and celebrity, F E Smith was a Privy Councillor and a Knight Grand Commander of the Most Exalted Order of the Star of India. There is, however, a darker side to the pursuit of glittering prizes, the cost in terms of a personality deformed and relationships destroyed. Frederick Edwin Smith, first Earl of Birkenhead, was summed up, just five years after his death, as follows:<sup>10</sup>

“He was tall, dark, slender and a little over-dressed. His eyes and hair were lustrous; the first from nature, the second from too much oil. His mouth had always a slightly contemptuous droop, his voice was a beautiful drawl. ... Many people loved him, most distrusted him, some despised him, and he despised almost everybody. In his later career ... he served himself more faithfully than his God or his country ...”.

- 21 It is worthwhile concentrating on F E Smith because he did manage to accumulate an extraordinary number of glittering prizes through the law and his own brilliance. However, glittering prizes appear to pall, once they are grasped, and winning the glittering prizes rarely seems to lead to happiness or fulfilment.
- 22 An assessment of F E Smith's greatness should be left to the end. It is now appropriate to leave the glittering prizes and turn to consider another means of seeking to achieve legal greatness, being instrumental in making the world a better place.

### **Making the world a better place**

- 23 It must be conceded that making the world a better place appears to be a much nobler motive for pursuing the law than merely accumulating wealth, honours and celebrity. It is certainly a more fashionable and socially acceptable motive. Law reform and applying the law so as to reflect the latest

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<sup>9</sup> T. S. Matthews *Great Tom* (1973) ch 7.

<sup>10</sup> George Dangerfield, *The Strange Death of Liberal England* (New York: Perigee Books, 1980), 534-35. First published 1935.

community expectations or ideas can be very alluring, even seductive. Vocally supporting such an approach can attract fame, even adulation, without any requirement to do a great deal.

- 24 Embarking on making the world a better place is, however, much more dangerous and potentially destructive than pursuing glittering prizes. An individual's pursuit of those shiny baubles rarely does wide-scale damage to a broad range of people or to society in general.
- 25 The world contains so much that is evil and unjust, tragic and dysfunctional, so many things, institutions and people that are broken. It seems so obvious that the world needs to be changed in order to make it better. Surely the law provides a real opportunity to make a difference, to right wrongs, to root out evil.
- 26 When considering the apparently obvious, it is always useful to research whether Groucho Marx has said anything relevant. In this regard, he made this observation "*Politics* is the art of looking for trouble, finding it everywhere, diagnosing it incorrectly and applying the wrong remedies." "Politics" in this context can be seen as including law reform and legal activism.
- 27 Groucho Marx, with his usual pithy perspicacity, has identified the major difficulties for lawyers who commit themselves to global amelioration. It is easy to look for and find trouble, that is, injustice, evil, things that need to be changed. The real challenges are: diagnosing the trouble correctly; and, applying the correct remedies.
- 28 When it comes to diagnosis, it is not possible to be tolerantly agnostic or relativistic as to what truly is evil or injustice. Questions such as: 'Is what I want to destroy evil?' or 'Is this an unjust law?' must be answered definitively

and correctly. Martin Luther King Jr realised this necessity in his campaign for civil rights. He provided his answer in his Letter from a Birmingham Jail:<sup>11</sup>

“How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.”

29 Another fundamental problem with diagnosing the trouble was identified succinctly by a man who had great experience of suffering and evil in a system born out of a lawyer’s attempt to make the world a better place. Aleksandr Solzhenitsyn said:<sup>12</sup>

“If only it were all so simple! If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts through the heart of every human being. And who is willing to destroy a piece of his own heart?”

30 Perhaps the most effective way to make the world a better place is by changing yourself for the better first. Then it may not even be necessary to change the rest of the world.

31 Even if it is possible to disprove Groucho Marx and diagnose the trouble correctly, applying the correct remedy remains a problem.

32 Programs for wide-scale improvement are, in fact, dangerous because they have inherent within them great scope for harm, both unintentional and intentional.

33 The complexity of the world and of human nature ensures that change in human society is constantly subject to the law of unintended consequences.

34 An incident during British rule in India furnishes just one small example of law reform leading to unintended deleterious consequences. The trouble was the

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<sup>11</sup> M L King Jr, “Letter from a Birmingham Jail” 16 April 1963 ([https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) accessed 26 July 2017)

<sup>12</sup> A Solzhenitsyn, *The Gulag Archipelago* (Collins 1974) p 17.

high number from deaths from cobra bites in Delhi. Well-meaning legislators diagnosed the cause as the presence of too many cobras in a densely populated area and introduced a law aimed at saving lives. Any person who handed in a dead cobra at a police station was to be paid a bounty. After a while, human nature being what it is, enterprising people began to breed cobras in order to kill them, hand them in and receive the bounty. Eventually, there were so many cobras, so many more cobra bites and so much more to be paid in bounties, that the scheme was scrapped. The cobra breeders found themselves with countless worthless cobras on their hands. Naturally, what happened was that the cobras just escaped. The result was more cobras and more deaths than ever before. Groucho Marx was vindicated and the law of unintended consequences produced its not uncommon baleful effect.

- 35 The dangers inherent in trying to make the world a better place do not end with unintended consequences. The programs of change of those who want to root out evil and improve the world most often require many other people to change. Consider how difficult it is to change yourself for the better. It is not surprising that people often resist change imposed on them by others. When there is resistance to change, which cannot be overcome with peaceful persuasion, reformers are confronted with the choice of abandoning their programs or forcing others to change by intimidation or violence. The more passionate the reformers, the more likely they are to be blind or unconcerned about resorting to force and, if necessary, bloodshed.
- 36 The political revolutions of the last two and a half centuries offer bloody examples of this effect. Lawyers have played a significant part in those revolutions, even in their most destructive and inhuman aspects. Danton, Robespierre and Lenin were all lawyers. Danton, first president of the Committee of Public Safety, was an advocate in Paris. Robespierre, who orchestrated the reign of terror, was a lawyer in Arras well known for altruism and representing the poor. Lenin was a lawyer who practised in Samara.



- 37 This all leads to the second warning. Beware the self-proclaimed reformer who does not identify what is evil and unjust, as Martin Luther King Jr did. Beware the reformer who does not acknowledge that the line between good and evil cuts through every human heart. Be very afraid of such a reformer who is a lawyer and passionately committed to the program of reform.
- 38 None of what I have said is designed to discourage law students or lawyers from trying to make the world a better place. Rather, it is only a warning that actually improving the world is difficult and dangerous and, perhaps, change for the better should start, on a smaller scale, with yourself.

### **Encouragement**

- 39 This brings me to the encouragement. Despite the dangers, difficulties and risks, greatness can be achieved and great things can be done, even by lawyers. The key is not collecting glittering prizes or attempting to make the world a better place. The key is St Augustine's observation: "Quod minimum, minimum est, sed in minimo fidelem esse, magnum est." - What is a little thing, is (just) a little thing. But to be faithful in a little thing is a great thing.
- 40 It must be acknowledged that St Augustine's idea can be seen as entirely out of place in the modern world. The education system, the media (whether mass, social or anti-social), politics, our modern culture, all encourage us to concentrate on the big issues, the global problems and the systemic solutions (which usually require increased taxation and many politicians and public servants traveling at great expense to exotic locations to talk to one another). These things and events happening on the other side of the world are identified as the "important" things. We learn about the "important" things of the past; it is called "history". We allow ourselves to be bombarded with information about the "important" things of the present all day long; it is called "news". We are encouraged to have very strong opinions about these "important" things notwithstanding that we have little if any direct knowledge of any of them, have never met the people involved, are unlikely ever to be

directly affected by the events and their consequences and can actually do little if anything about them.

- 41 Through instant communication and the intense sense of being in touch, the message is incessantly conveyed that if we care about certain things, if we like certain people or groups and hate others, if we raise awareness about certain things – we are good, perhaps even great, people.
  
- 42 St Augustine is the better guide to greatness; greatness which lies in faithfulness in the small things. This should be very encouraging for lawyers. As lawyers or law students, we rarely have the opportunity to address things that are “important” according to the modern world. Very few of us will act on a global stage, or even a stage much greater than a handful of people and things. Most of our time in the law is, and will be, spent dealing with individual cases or transactions or issues, in one sense the little things – a house purchase, recovery of a debt, a defective product liability claim, a divorce and a property settlement, an unfair dismissal claim, a manslaughter charge, a company merger or acquisition, a claim of racial discrimination, a pollution prosecution, a claim of abuse of market power, a potential tax liability. They may be large or small in value. Almost all are very important for those directly affected but few have lasting significance once they are resolved. They are very unlikely to be considered among the “important” things that dominate the modern media.
  
- 43 But in the little things of the law, the potential for true greatness lies. It is the individual cases or transactions that involve real people facing actual difficulties, opportunities or disputes. Focusing on the specific, the immediate, the particular matter presently before us is not only right and proper, it is the potential path to greatness. When done faithfully and conscientiously in a society in which the laws are just, this has the inestimable benefit of protecting people who need protection, supporting people who need support and maintaining a just and fair society for all.

- 44 Paying attention only to the “important” things of the modern world is unlikely to make things better for people, especially those in need of protection or support. You cannot love “world peace,” or help “social justice”. You can only love those with whom you are actually prepared to come into contact. You can only help those near enough to be affected by what you do. For lawyers, ignoring the particular people and issues directly in front of us or addressing them poorly is a true failure.
- 45 Faithfully and conscientiously performing your duty as a lawyer in every transactions, matter or advice, no matter how small, is a great thing. We have it on the highest authority that “He that is faithful in that which is least is faithful also in much”.<sup>13</sup>
- 46 If we are fortunate as lawyers, we shall only be called upon to demonstrate our faithfulness in the little things. Any sacrifices we may be required to make will be small. However, when laws are enacted that are unjust (in the sense Martin Luther King explained), lawyers may be called upon to be faithful to their beliefs and vows in great things. Great sacrifices may be required.
- 47 This brings us to another Lord Chancellor, Sir Thomas More, the first layman to hold that high office. A man who placed his own conscience above his king’s demands. A scholar of the Renaissance, a lawyer, a judge, Speaker of the House of Commons, King Henry VIII’s Lord Chancellor after the fall of Cardinal Wolsey, an enlightened father who insisted his three daughters have the same education as his son. Unable to reconcile his conscience with the laws and processes used to achieve the King’s divorce, he resigned his high office, gave up its emoluments and retired from public life. Renouncing the glittering prizes was not, however, enough to save him.
- 48 On 1 July 1535, he was indicted for high treason because of his failure to comply with the Act of Succession passed by the Parliament at the insistence of the King. His speech in his own defence at his trial catches at the same

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<sup>13</sup> Luke 16:10.

concept of an unjust law as Martin Luther King Jr did some 428 years later. Sir Thomas More said:<sup>14</sup>

“Forasmuch, my lord, as this indictment is grounded upon an act of Parliament directly oppugnant to the laws of God and his holy church, ...; it is therefore in law amongst Christian men, insufficient to charge any Christian man.”

49 Sir Thomas More was convicted on the false evidence of Richard Rich, who himself became Lord Chancellor under Edward VI. He was sentenced to a traitor’s death – to be hanged, drawn and quartered – but the king graciously allowed him to be beheaded. Being summoned to the scaffold on Tower Hill, he told the lieutenant who escorted him, “See me safe up, and for my coming down let me shift for myself.”<sup>15</sup> He blindfolded himself and exhorted the assembled crowd to witness his end, the king’s good servant but God’s first.<sup>16</sup>

### **True Greatness and the Law**

50 Who achieves true greatness in the law?

51 F E Smith hated the law but collected its glittering prizes. What he achieved and what it cost him is reflected in one historian’s assessment of him. Sir David Cannadine, Dodge Professor of History at Princeton University and a Visiting Professor of History at Oxford University, wrote of him:<sup>17</sup>

“FE’s life was shamelessly, successfully and simultaneously devoted to self-advancement, self-advertisement, self-indulgence and self-destruction, and he achieved more distinction in each of these fields than most men achieve in any. Driven by remorseless ambition, and

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<sup>14</sup> Sir Thomas More's Speech at his Trial. (<http://www.luminarium.org/renlit/moreddefense.htm> accessed 30 July 2017)

<sup>15</sup> W Roper, *The life of Sir Thomas More* (Burns & Oates 1905), p 101.

<sup>16</sup> First reported in indirect speech in the *Paris Newsletter* (1535): *Après les exhorta, et supplia tres instamment qu'ils priassent Dieu pour le Roy, affin qu'il luy voulsist donner bon conseil, protestant qu'il mourroit son bon serviteur et de Dieu premierement.* See also: 'Henry VIII: July 1535, 1-10', in *Letters and Papers, Foreign and Domestic, Henry VIII, Volume 8, January-July 1535*, ed. James Gairdner (London, 1885), pp. 379-402 and *British History Online* (<http://www.british-history.ac.uk/letters-papers-hen8/vol8/pp379-402> accessed 2 August 2017).

<sup>17</sup> David Cannadine’s review of *F.E. Smith, First Earl of Birkenhead* by John Campbell, Johnathan Cape, in *The London Review of Books*, 19 January 1984, Vol. 6 No. 1 pages 10-11.

aided by a first-rate brain of quicksilver speed, he amassed a remarkable tally of gongs, baubles and glittering prizes, at Oxford, in the law, and in politics. Endowed with a gigantic ego and towering self-confidence, he was the supreme right-wing demagogue between Lord Randolph Churchill and Mosley, with mesmeric oratorical gifts of lightning wit, stinging retort and poisonous vituperation. And he was as reckless as he was rude: his magnificent carelessness, shameless hedonism and limitless extravagance betokened an inexhaustible appetite for life and pleasure; he squandered several fortunes on houses and horses, cars and cards, boats and brandy; he excelled at rugby, riding, golf and tennis; he burned all his candles at both ends; and he drank and spent as if there was no tomorrow. His consumption was conspicuous in every sense, and in the end he died of drink and left only debts. In one guise, FE was the classic exemplar of the rags-to-riches fable: in another, he was the sort of man who gets ambition a bad name.”

- 52 It is a damning assessment of the ultimate seeker of glittering prizes. There is no hint of real greatness beyond great ability, great self-indulgence and great self-destruction.
- 53 Turning to the reforming activists, it is difficult to find anything amusing or entertaining to say about the revolutionary lawyers. Danton, Robespierre and Lenin sought to destroy political systems because they believed they were evil and in order to bring about a better world. Two were guillotined and one was embalmed in order to be revered by an oppressed nation. Their great failure was the failure to realise that the line separating good and evil does not lie between classes or parties or groups but cuts through every human heart. To conclude that these lawyers made the world a better place is unsustainable. Their greatness lies primarily in the great destruction and misery that they unleashed upon their nations and the world.
- 54 Great and worthwhile things can, however, be done, even by lawyers. Be faithful to just laws and conscientiously perform every proper task you are

called upon to undertake as a lawyer. By being faithful in the little things, prepare yourself to be faithful, if required, in the great things.

Quod minimum, minimum est; sed in minimo fidelem esse, magnum est.