

ROAMING AMONGST LEGAL GIANTS: PERSEVERANCE, PERSISTENCE AND PRACTICE IN THE LAW

Opening of Law Term 2023 Keynote Speech to the Coptic Orthodox Divine Liturgy

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The topic of tonight's address is 'Roaming amongst legal giants: Perseverance, persistence and practice in the law.' In the legal profession, it is often said that we roam amongst 'legal giants'. When we hear this, we often immediately jump to think of high-ranking judicial officers, senior counsel and others who have made important contributions to our profession and the law. But, tonight, I want to speak about a different group of legal giants – law students; not any law student ... but those who, despite the odds stacked against them, enter the legal profession and make a quiet, yet equally important, contribution to our profession and the law every single day.

The brainchild behind this topic is a young University of Sydney Commerce / Law student and graduand. For the purposes of this paper, let's call him Dane. In fact, even better - Let's give him a memorable surname - We shall call him Dane "Law", but we will spell it "Luo". Despite the generic-sounding surname, there is nothing ordinary about Dane's energy and drive, nor indeed his intellect or passion for the law.

Before embarking upon the topic proper, I want to tell you a little bit about this bright, talented young student. In late 2016, Dane wrote to me to request permission to attend my court and learn about the workings of the New South Wales justice system. Such was his enthusiasm and eagerness that he commenced attending court within weeks of completing his Higher School Certificate and, after gaining

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admission into a Bachelor of Law and Commerce at the University of Sydney, he continued to attend regularly. During this time, he assisted me, as an intern, in research, the preparation of presentations and papers, and the proof-reading of judgments, for which I am eternally grateful, and during the process of which we became good friends with a mutual respect for each other's experiences, ideologies and advancement.

Throughout his tertiary studies, he excelled with outstanding results in his course. But somewhere along the path to greatness (he is too humble to ascribe to himself such an epithet) he came to write a dissertation, one of many, on a topic close to his heart, and which similarly struck a chord with me: "*Outliers: Understanding the Mechanisms through which Children Escape Disadvantage.*" That is, in part, what I wish to touch upon tonight, even if it be briefly, given breadth of such an important topic, which could easily occupy hours of discussion and proposals for educative enhancements to our system of learning, but particularly as this opening of law term service has, in the past, typically been attended by legal giants and students alike.

The law is no easy discipline to enter or learn. Universities demand very high entrance ranks, list a mountain of readings and are certainly not known for being easy markers in assessments. Australian law students have higher rates of psychological distress than those in the general population of a similar age. In a 2010 study amongst law students, 35.1% of participants reported having experienced depression personally and 49.3% had sought help about depression.² Once they graduate and gain admission, the legal profession can be a gruelling place. This has only grown in recent years in the context of an ever-constant pressure to reach billable targets³ and a 'win at all costs' attitude.⁴ Sadly,

² Norm Kelk, Sharon Medlow and Ian Hickie, 'Distress and Depression among Australian Law Students: Incidence, Attitudes and the Role of Universities' (2010) 32 *Sydney Law Review* 113, 117–8.

³ See *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 422 (Kirby P).

⁴ See Justice Susan Kiefel, 'Ethics and the Profession of the Lawyer' (Speech, Queensland Law Society, The Vincents' Symposium, 26 March 2010) <www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2010-03-26.pdf>.

Australian lawyers have much higher levels of psychological distress and 44.5% of lawyers in a 2011 study recorded that they had personally experienced depression.⁵ Further, women and minorities experience significantly higher levels of harassment and job dissatisfaction.⁶

Fortunately, there has been a growing awareness of these issues in the profession. Whilst much more needs to be done, steps have been taken to address workplace harassment, improve well-being and increase gender and racial diversity amongst lawyers. But there is another dimension that I believe has not received much attention – it is the challenges for people who grew up in circumstances of disadvantage to enter and stay in the profession. I use disadvantage to encompass a wide range of socio-economic factors at a young age, including poverty, single or separated parenting, or living with abuse or domestic violence in the family home. It was recently suggested that lawyers may be part of a ‘profession for the wealthy’.⁷ More often than not, disadvantage is pervasive, extending to non-English speaking backgrounds, ethnically and religiously diverse minorities, and those labouring under a range of disabilities and afflictions.

To understand the enormity of challenges that those with disadvantage face, one must begin by exploring the impact of disadvantage before one even begins primary education. At this stage, parenting practices and preschool shape a child’s future development. This is the most critical stage for a child⁸

⁵ Sharon Medlow, Norm Kelk and Ian Hickie, ‘Depression and the Law: Experiences of Australian Barristers and Solicitors’ (2011) 33(4) *Sydney Law Review* 771, 780.

⁶ See, eg, Trish Mundy and Nan Seuffert, ‘Are We There Yet? Best Practices for Diversity and Inclusion in Australia’ (2020) 27(1) *International Journal of the Legal Profession* 81, 91; Regina Graycar, ‘Gender, Race, Bias and Perspective: How Otherness Colours Your Judgment’ (2008) 15 *International Journal of the Legal Profession* 73; Kcasey McLoughlin and Hannah Stenstrom, ‘Justice Carolyn Simpson and Women’s Changing Place in the Legal Profession: “Yes, you can!”’ (2020) 45(4) *Alternative Law Journal* 276, 282–3.

⁷ Kate Allman, ‘A profession for the wealthy? The enduring problem for diversity in law’ (Blog Post, *Law Society Journal*, 1 December 2020) <<https://lsj.com.au/articles/a-profession-for-the-wealthy-the-enduring-problem-for-diversity-in-law/>>.

⁸ James J Heckman and Stefano Mosso, ‘The Economics of Human Development and Social Mobility’ (2014) 6(1) *Annual Review of Economics* 689.

because all skills are built on a foundation of capacities that are developed much earlier. This is why research has shown that early learning makes later learning easier, more efficient and increases self-productivity.⁹ It is also why good parenting at an early stage is an investment in child development that can set the foundation for personal, social and economic wellbeing.¹⁰ But it is at this stage that disadvantaged children begin to fall behind. Because their families have fewer resources to make those investments – purchasing books, sending their children to sport, buying a musical instrument, obtaining high-quality childcare and other endowments – that are tailored to each child’s interests.¹¹ For example, if a child is interested in drawing, their parents are more likely to purchase art supplies, take them to visit art galleries and perhaps even enrol them in private lessons. Such investments are simply out of reach to financially struggling and disadvantaged families.

A recent economic study used high-quality cohort data that followed the development of 10,000 Australian children¹² to analyse the impact of a child’s socio-economic position before they start primary school on their cognitive and non-cognitive skills by the end of high school. The results make for a shocking read when comparing children in the top 25% against the bottom 25% based on their parents’ socio-economic position. The study highlighted the discrepancies in parental educational investments between disadvantaged children and their peers before they even start school. At ages 4 - 5, only about 32% of children from the bottom quartile were reading daily. In contrast, 71% of children from the top quartile were reading every day. This discrepancy and other differences in how parents of

⁹ Eric I Knudsen, James J Heckman, Judy L Cameron and Jack P Shonkoff, ‘Economic, Neurobiological, and Behavioural Perspectives on Building America’s Future Workforce’ (2006) 103(27) *Proceedings of the National Academy of Sciences* 10,155.

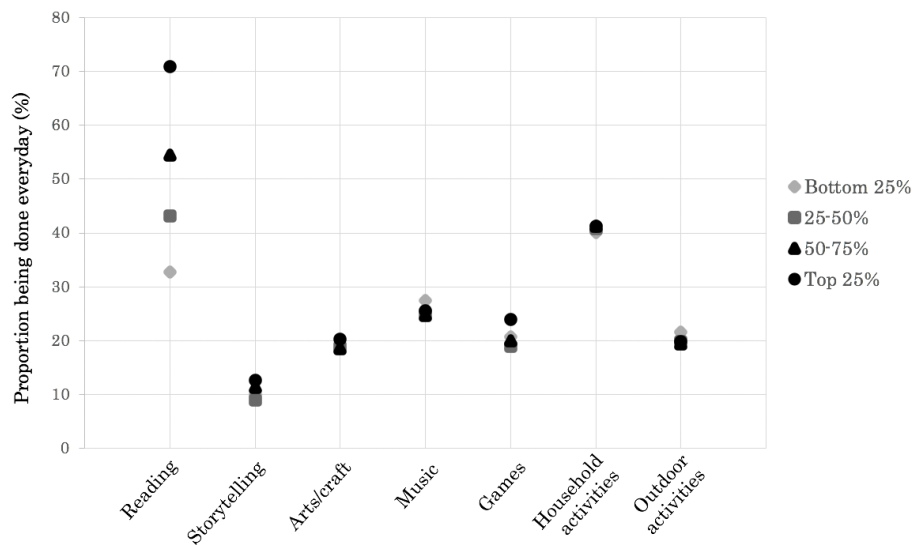
¹⁰ James J Heckman and Stefano Mosso, ‘The Economics of Human Development and Social Mobility’ (2014) 6(1) *Annual Review of Economics* 689.

¹¹ Deborah A Cobb-Clark, Nicolas Salamanca and Anna Zhu, ‘Parenting Style as an Investment in Human Development’ (2019) 32(4) *Journal of Population Economics* 1315. See, also, Robert H Bradley and Robert F Corwyn, ‘Socioeconomic Status and Child Development’ (2002) 53(1) *Annual Review of Psychology* 371.

¹² The study used data from *Growing Up in Australia: The Longitudinal Study of Australian Children* (‘LSAC’), which is conducted in partnership between the Department of Social Services, Australian Institute of Family Studies and Australian Bureau of Statistics.

different classes spend time with their children¹³ goes to explain why a US study found that children from welfare-reliant families begin formal schooling with less than half the cumulative vocabulary as children from professional families.¹⁴ Therefore, disadvantaged children are already set back by meaningful differences even before schooling has commenced.

Figure 1: Proportion of educational activities being done daily in families based on SEP quartile



The study found that these differences are sustained, and in some cases become enlarged, as those students go through primary and high schools. The study then turned to compare children who were at the top 25% of the National Assessment Program – Literacy and Numeracy (‘NAPLAN’) results against those who were in the bottom 25% of NAPLAN at ages 14 to 15. It showed that, of the children who were in the top quartile of NAPLAN results, 51.4% were children who were in the top quartile of socio-economic position at ages 4 - 5. Only 7.5% were children who were in the bottom quartile of socio-

¹³ See also William Sewell and Robert Hauser, ‘Causes and Consequences of Higher Education: Models of the Status Attainment Process’ in William Sewell, Robert Hauser and David Featherman (eds), *Schooling and Achievement in American Society* (Elsevier Science & Technology Books, 1976) 9; Neeraj Kaushal, Katherine Magnuson, and Jane Waldfogel, ‘How Is Family Income Related to Investments in Children’s Learning?’ in Greg J Duncan and Richard J Murnane, *Whither Opportunity? Rising Inequality, Schools, and Children’s Life Chances* (Russell Sage Foundation, 2011) 187.

¹⁴ Betty Hart and Todd R Risley, *Meaningful Differences in the Everyday Experience of Young American Children* (Paul H Brookes Publishing, 1995)

economic position at ages 4 - 5. When we turn to children who were in the bottom quartile of NAPLAN results at ages 14 - 15, 34.5% were children who were in the bottom quartile of socio-economic position at ages 4 - 5. The conclusion to be arrived at, therefore, is that is that a child’s socio-economic position at 4 - 5 years correlates with their cognitive skills up until the school leaving age.¹⁵ Further, literacy, one would comfortably argue, is an area in which successive State and federal governments cannot become complacent. There has always been a clear nexus between education spending and improved youth literacy.

Table 3: Cognitive Skills at Age 14-15 and SEP at Age 4-5 By Quartiles

		Cognitive Skills at ages 14-15				Total
		Bottom 25%	25-50%	50-75%	Top 25%	
SEP at ages 4-5	Bottom 25%	506 46.3% 34.5%	291 26.6% 19.6%	184 16.8% 12.4%	112 10.2% 7.5%	1093
	25-50%	448 31.2% 30.5%	446 31.1% 30.1%	323 22.5% 21.8%	218 15.2% 14.7%	1435
	50-75%	366 22.5% 24.9%	419 25.7% 28.3%	454 27.9% 30.6%	391 24.0% 26.3%	1630
	Top 25%	147 8.3% 10.0%	326 18.5% 22.0%	524 29.8% 35.3%	764 43.4% 51.4%	1761
Total		1467	1482	1485	1485	6331

What this study showed was that a disadvantaged upbringing can ‘entrench’ one’s place in their cognitive and non-cognitive scores.¹⁶ These differences are further entrenched by Australia’s partitioned school system.¹⁷ Students in high resource families are more likely to attend higher fee-paying independent and Catholic high schools.¹⁸ Students of those schools are more likely to obtain

¹⁵ The school leaving age in South Australia is 16 years. The school leaving age in Australian Capital Territory, New South Wales, Northern Territory, Queensland and Victoria is 17 years. The school leaving age in Tasmania and Western Australia is 18 years.

¹⁶ See also Brian Graetz, ‘Socioeconomic Status in Education Research and Policy’ in John Ainley, Brian Graetz, Michael Long and Margaret Batten (eds), *Socioeconomic Status and School Education* (DEET/ACER, 1995).

¹⁷ Angela Melville, ‘Barriers to Entry into Law School: An Examination of Socio-economic and Indigenous Disadvantage’ (2014) 24 *Legal Education Review* 45, 54.

¹⁸ Donald S Anderson and Aat Emile Vervoorn, *Access to Privilege: Patterns of Participation in Australian Post-Secondary Education* (ANU Press, 1983).

the results required for university admission as compared to students who attended government-funded schools.¹⁹ Whilst children can attend government-funded selective schools, entrance to those schools is also highly competitive and has the effect of entrenching the ‘gap’ that prevails between disadvantaged children and their peers from primary school.

Turning to Year 12, the study considered the difference in average Australian Tertiary Admission Ranks (commonly referred to as ‘ATAR’)²⁰ between children in the bottom and top quartiles of socio-economic position at ages 4 - 5 is between 5 to 14 ‘points’.

Table 7: ATAR or Equivalent Scores on SEP Quartiles

	(1) ATAR (or equivalent) (w/o Controls)	(2) ATAR (or equivalent) (w/ Controls)	(3) Standardised ATAR (or equivalent) (w/o Controls)	(4) Standardised ATAR (or equivalent) (w/ Controls)
Bottom 25%	69.89**** (1.300)	67.96**** (2.127)	-0.538**** (0.0887)	-0.663**** (0.137)
25-50%	73.30**** (0.943)	70.53**** (1.985)	-0.319**** (0.0661)	-0.498**** (0.127)
50-75%	77.18**** (0.785)	72.20**** (1.973)	-0.0703 (0.0511)	-0.390**** (0.127)
Top 25%	83.00**** (0.619)	73.16**** (2.190)	0.303**** (0.0371)	-0.329** (0.141)
Observations	1317	1317	1317	1317
R-squared	0.965	0.968	0.0898	0.162
Adj. R-squared	0.965	0.968	0.0871	0.149
F-statistic	9150.1	2222.3	32.22	14.66

Regression results for the ATAR (or equivalent) scores. No constant. Full results in Tables A2 and A3. Standard errors in parentheses. Significance stars: * $p < 0.10$, ** $p < 0.05$, *** $p < 0.01$, **** $p < 0.001$.

The flow-on effect of disadvantage in early development to high school grades makes achieving admission into a law degree a significant hurdle to entering the legal profession.²¹ It is well-known that the minimum ATARs for law degrees are exceptionally high – requiring ranks generally well above 95. This means that students seeking admission need to place in the top 5% of those who sat the Higher

¹⁹ Sinan Gemici, Patrick Lim, and Tom Karmel, *The Impact of Schools on Young People's Transition to University: Longitudinal Surveys of Australian Youth* (Research Report 61, National Centre for Vocational Education Research Ltd, 2013).

²⁰ The study used data collected in 2018. It standardised the Overall Position (commonly referred to as ‘OP’ and was used in Queensland until 2020) and International Baccalaureate (commonly referred to as ‘IB’) scores to the ATAR to capture statistics for all Australian students.

²¹ Angela Melville, ‘Barriers to Entry into Law School: An Examination of Socio-economic and Indigenous Disadvantage’ (2014) 24 *Legal Education Review* 45, 52–4.

School Certificate exams. For many disadvantaged students, that can be an insurmountable hurdle. Research by Professor Andrew Norton (Professor in the Practice of Higher Education Policy at the Centre for Social Research and Methods at the Australian National University) found that, in NSW, high socio-economic students outnumber low socio-economic students in the 90+ ATAR group by more than 7-to-1.²² The very fact that a disadvantaged student has met the extremely high entry level for a law degree is a mighty feat in and of itself. Just 10% of high school students enrolling in law degrees across Australia between 2005 and 2015 came from the lowest quartile of socio-economic status measures.²³ That is compared to almost 60% of law students coming from the top two quartiles.²⁴ When viewed in context, a disadvantaged student studying a law degree would have to defy the odds against them to gain admission.

Even surpassing the hurdle of admission, disadvantaged students enter a highly competitive cohort where they must compete against the top 5%. Students from financially struggling families often find themselves *needing* to take part-time work to cover the cost of living expenses, expensive textbooks and other resources, reducing their available time to study and for other activities.²⁵ An increase in university fees will also likely have a detrimental impact upon the ability of disadvantaged students to take up university education.²⁶ In a recent article published in the *Law Society Journal*, lawyer Arlia Fleming, who, at various points in her youth, was homeless and impecunious, with no secure bed to sleep in, no income and no family support to fall back on, described her experience in law school in these terms:

I would spend hours every semester trying to track down second-hand textbooks, often relying on the outdated version of a textbook so I wouldn't have to buy the new one. I remember being in

²² Kate Allman, 'A profession for the wealthy? The enduring problem for diversity in law' (Blog Post, *Law Society Journal*, 1 December 2020) <<https://lsj.com.au/articles/a-profession-for-the-wealthy-the-enduring-problem-for-diversity-in-law/>>.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Although students who are not from disadvantaged backgrounds may also undertake work experience for various reasons, part-time work is generally not a necessity to afford living and study expenses.

²⁶ Margaret Thornton, 'Deregulation, Debt and the Discipline of Law' (2014) 39(4) *Alternative Law Journal* 213.

classes, scrambling to find and match up the pages of the textbook in the reading material to the old edition I had.

In my first year studying law, it was so overwhelming. I was trying to live out of home, everything was so difficult, and it was really challenging for me. A series of events in my life led to me being homeless for a time.

It is the culmination of a range of factors – often outside one’s control and beginning at a very young age – that make becoming a lawyer a distant dream for people born into disadvantage. When considering the struggles they must overcome, it is no surprise that those from low socio-economic backgrounds are underrepresented in the legal profession.²⁷ The enormity of the challenge for a disadvantaged student to achieve the very high marks necessary to gain admission and the persistence to advance through law school requires perseverance, a deep desire to learn, and overcoming disappointment and discouragement. In many ways, these students can be outliers from those born into similar circumstances. We, as a profession, as an institution, should celebrate such talent, success and perseverance. Professor Peter Gerangelos AM (Professor of Constitutional Law at Sydney Law School) in a 2019 graduation speech at the University of Sydney described the students of whom he had the ‘utmost admiration’ as follows:

[It is] the ones not necessarily in the top academic echelon or as gifted, or on *Sydney Law Review*, not necessarily the ones who received that coveted graduate job in the large commercial firms, or as associates of our judges; but rather the ones who, despite all this, doing what they could generally to contribute, lending a helping hand to fellow students, going about their study conscientiously, quietly, sincerely striving to learn and to think like lawyers, taking in the ethos and ethics of the law, barely scoring much above a Credit, always attempting their hand at mooting although never quite making it beyond the quarter-finals; but never complaining, or giving up, or succumbing to envy, who kept picking themselves up, dusting themselves off, and returning once more to the fray; and especially the ones who had to endure very difficult personal vicissitudes on top of everything else.²⁸

But too often, not only do their heightened challenges go unrecognised, they go unspoken.

²⁷ Angela Melville, ‘Barriers to Entry into Law School: An Examination of Socio-Economic and Indigenous Disadvantage’ (2014) 24 *Legal Education Review* 45. See, also, John Clarke, Bruce Zimmer and Robert Main, ‘Review of the Under-Representation in Australian Higher Education by the Socio-Economically Disadvantaged and the Implications for University Funding’ (1999) 8(1) *Journal of Institutional Research in Australasia* 1.

²⁸ Peter Gerangelos AM, ‘University of Sydney Law Graduation’ (2019) 41(4) *Sydney Law Review* 417, 421.

What can be done to harness the full potential of future generations of thinkers and leaders? In a country as economically fortunate as ours, we need to continue to invest in education and our most important resource - children, and we need to go way back to early childhood where literacy begins. Early intervention: Starting early with literacy development, even before formal schooling begins. This is crucial for children from disadvantaged backgrounds. This can be achieved through a myriad of home and out-of-home programs including parent-child reading time, preschool programs and home visiting services. Personalised instruction: Providing personalised instruction that takes into account the individual needs and strengths of each child with a view to improving literacy skills. This could involve different teaching approaches, including multisensory instruction and the use of technology. Building Vocabulary: Those from disadvantaged backgrounds have a smaller vocabulary compared to their peers. Vocabulary development is a critical aspect of learning and encompasses the knowledge and skills students need to access, understand, analyse and evaluate information, to express thoughts, present ideas and opinions, and to interact with others and participate in activities at school and in their lives beyond school.²⁹ Encouraging a love of reading: Developing a love of reading can help children to improve their literacy skills and is especially important for disadvantaged children who may not have access to reading materials and other resources. Encouraging children to choose books that interest them and creating an environment that supports reading can help foster this love. Finally, the provision of adequate resources: Providing adequate resources such as books, technology and specialised, trained teachers and aides can help disadvantaged students better develop their literacy skills. Ensuring that these resources are accessible and available to all children, regardless of their background, can help close the literacy gap.

I would say to those in the profession and the judiciary who come from disadvantaged backgrounds, diverse backgrounds, those with unique, atypical stories and trajectories: you are valued leaders. By working and sharing your journey, you are signifying to the next generation of lawyers that it is possible to overcome adversity. Create openings - open the doors to your offices, your chambers, your courts

²⁹ F-10 Curriculum, Australian Curriculum, Assessment and Reporting Authority (ACARA).

and your minds. Give young legal aspirants an opportunity to discover, to learn, to understand and to realise their potential. It is only via these means through which they can prove themselves. Mentor them, teach them and guide them along the path of learning.

To the students the subject of tonight's focus, who exercised resounding persistence, determination and commitment, in your everyday work, you quietly bring a different perspective to the law because you have a more attuned understanding of the needs of the weak and vulnerable in our community when they seek the assistance of the legal system. Your contribution to the law is no less important than other legal giants – the partners, Senior Counsel, Professors of Law and judicial officers – because the law does its most important work when it vindicates the rights of the vulnerable, the weak, the underprivileged and the disenfranchised amongst us.

In the words of the orthodox faith, particularly in this hallowed place, where we meet to bless the law term and those within this esteemed profession for the year ahead, I am reminded of the Book of Psalms, Chapter 82, Verse 3: 'Give justice to the weak and the fatherless and maintain the right of the afflicted and the destitute'.³⁰ It is for these reasons why the legal giants that roam the profession include those who have stood tall in the face of adversity, staring down their disadvantage to accomplish great things in an unremitting, competitive and challenging profession.

³⁰ The Bible, English Standard Version, Psalm 82:3.