

# *Are Judges Out of Touch?*

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## *Abstract*

Media claims and public opinion surveys suggest that there is a popular perception that judges are out of touch with what ordinary people think. This view is linked with punitiveness and confidence in the courts; those who think that judges are out of touch are also more likely to think that sentences are too lenient and less likely to have confidence in the courts. This article reports on a mixed methods study of the views of jurors, analysing data emanating from the question: ‘How in touch do you think judges are with public opinion on sentencing?’ The findings provide a striking contrast with those from public surveys. Most jurors in the quantitative phase did not agree that judges were out of touch with public opinion on sentencing. Some of those who did think that judges were out of touch indicated in qualitative interviews that this was not necessarily a criticism, or suggested that ‘being out of touch’ did not apply to the judge in their trial. The implication we draw from these results is that the findings from public opinion surveys suggesting that judges are out of touch need to be viewed with caution, rather than being treated as evidence of the need for constraints on judicial discretion and the introduction of harsher sentences. More broadly, we show the importance of employing mixed research methods that can uncover more fully the range and depth of public opinion.

## **Introduction**

The issue of judicial remoteness and the apparent public perception that judges are out of touch is an aspect of the broader populist critique of judicial sentencing, which demands a new role for the public voice in sentencing matters. This populist critique of judges has been explained as an anti-establishment, anti-elitist denigration of the expert (Pratt 2007; Ryan 2005; Garland 2001; Hogg 2012), although the alleged decline in the influence of experts on penal policy has been contested by Matthews (2005:189). The call for a public voice in criminal justice policy and sentencing has created an upsurge in interest in accessing the views of ordinary members of the public through polling, focus groups and other means. Public opinion surveys sometimes ask questions such as: ‘Are judges out of touch with what ordinary people think?’, as well as the standard sentencing severity question: ‘Are sentences too harsh, about right or too lenient?’ A consistent response over time and across countries (including North America, the United Kingdom and Australia) is that sentences are too lenient (Gelb 2008a:73). When the question about judges has been asked in Britain and Australia, a majority of respondents have said that judges are out of touch. For example, successive sweeps of the British Crime Survey (‘BCS’) revealed that about 80% of

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respondents thought that judges were out of touch (Hough and Roberts 1998:16; Mattinson and Mirrlees-Black 2000; Mirrlees-Black 2001).<sup>1</sup> In a Scottish survey, 75% of participants thought judges were out of touch with what ordinary people think (Hutton 2005). A 2009 Australia-wide survey of public confidence in sentencing asked respondents whether they agreed with the statement 'Judges are in touch with what ordinary people think' — 58% disagreed with the statement (Mackenzie et al 2012:52).

Claims in the media that judges are out of touch are frequently made in the context of demands for harsher sentences. As such, it is unsurprising that the perception of judicial remoteness is consistently linked with both lower levels of confidence in sentencing and the perception that judges are too lenient (Hough and Roberts 1998; Hough and Roberts 1999; Mackenzie et al 2012). The statement 'Judges are in touch with what ordinary people think' was used as one of the seven items in the scale measuring confidence in sentencing in the Australia-wide survey of public confidence in sentencing mentioned above (Roberts, Spiranovic and Indermaur 2011). When the results of the Victorian component of this survey were released (Gelb 2011), a Melbourne newspaper (*Herald Sun*) linked the fact that most Victorians think that 'judges are out of touch with the views of ordinary people' with the usual criticism of inadequate sentences and repeated the call for community attitudes to be given a fair hearing (Editorial 2011).

The perceived gap between sentencing judges and the public, which is reported in surveys and polls, fuels what has become known in the literature as 'populist punitiveness' (Bottoms 1995) or 'penal populism' (Roberts et al 2003; Pratt 2007; Hogg 2012) and it is seen as a driving force behind harsher penal policies and sentencing laws.<sup>2</sup> However, there is a significant body of research that questions the general usefulness of 'top-of-the-head' responses, and that casts doubt on the worth of perceptions of lenient sentencing in particular. For example, survey respondents who assert that sentences are too lenient are also more likely to underestimate the severity of sanctions and to believe incorrectly that crime rates are rising (Gelb 2006:14; Jones and Weatherburn 2010). Moreover, research indicates that when members of the public are presented with information about a particular case, their sentencing preferences are not so dissimilar from the sentencing decisions of the courts. This finding has emerged consistently from surveys that either: presented respondents with a short vignette (Hough and Roberts 1999; Mitchell and Roberts 2012:152); gave respondents detailed facts from court files (Doob and Roberts 1988); presented the facts of the case to a focus group (Lovegrove 2007); or asked jurors about the sentence for the offender they convicted (Warner et al 2011).

Another relevant finding from the literature is that jurors, like others who have had contact with the criminal justice system, have more confidence in the system than the general public (Maruna and King 2004; Benesh 2006; Roberts and Indermaur 2009) even though the nature of the experience (positive or negative) seems to be more important than the fact of contact itself (Hough and Roberts 2004:83). An English study of jurors' confidence in jury trials reported 'an overwhelming degree of support' for the work of judges, which was contrasted with decontextualised studies claiming that judges are out of touch with the views of the general public or do not do a good job (Matthews, Hancock and Briggs 2004:31). Given these findings, it could be hypothesised that jurors would be less likely than members of the general public to say that judges were out of touch. Moreover,

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<sup>1</sup> This question appears to have been omitted from more recent sweeps of the BCS. It is not a standard question in the Australian Survey of Social Attitudes (AuSSA).

<sup>2</sup> Hogg (2012) argues that populism should not be assumed to be inherently reactionary and punitive, and should be taken more seriously — both conceptually and politically.

research on the effect of information on attitudes suggests that attitudes to the criminal justice system become more positive as knowledge about the system increases (Roberts et al 2012:1074) at least in the short term (Indermaur et al 2012). Therefore, it is plausible that jurors who receive more information about the sentencing process and sentencing patterns would be even less likely to perceive judges as being out of touch. The study reported in this article sets out to test these hypotheses by comparing: first, the jurors' views on judicial remoteness with those of the general public; and second, the views of jurors both before (Stage 1) and after (Stage 2) they received information on the sentencing process and sentencing patterns. In addition, it explores the relationship between perceptions of judicial remoteness and punitiveness. In line with previous findings based on the broader Australian public (eg Mackenzie et al 2012), it is predicted that juror perceptions of judicial remoteness will be associated with punitiveness. More critically, the study extends previous research in this area by using qualitative techniques more reflectively to garner an understanding of how and why judges are perceived to be remote. It attempts to engage with populism, rather than simply denigrate it (Hogg 2012).

In summary, this study has four aims:

1. to test the hypothesis that jurors are less likely than members of the general public to say that judges are out of touch with public opinion on sentencing;
2. to test the hypothesis that after receiving more information, jurors are even less likely to say that judges are out of touch;
3. to test whether juror perceptions of judicial remoteness are associated with punitiveness; and
4. to gain a deeper understanding of jurors' perceptions of judicial remoteness by exploring why judges are perceived as being out of touch and the reasons for any changes in views from Stage 1 to Stage 2.

This article concludes that caution is warranted when interpreting the results of the more commonly used public opinion surveys, which regularly report the perception that judges are out of touch and that their sentences are too lenient.

This article should not be taken as suggesting that the question of whether judges are in touch with public opinion on sentencing is one that can simply be addressed empirically as an issue of correctness or accuracy. Rather, it seeks to explore the views of jurors, as a section of the public that has had direct experience of a trial and has convicted an offender, and to compare their views with those of the general public. It aims to make a contribution to the existing research by uncovering a more engaged, informed, nuanced and deeper view of public attitudes to sentencing judges, which can then be used to assist in interpreting the results of other public opinion surveys.

There are a number of issues related to judicial remoteness, which this article does not attempt to deal with, including both the legal relevance of public opinion to sentencing (discussed by Roberts 2008), as well as the construction of 'informed public opinion' by some judges who have attempted to bring the public indirectly into the court room (see Kerr 2012). Nor does it explore the variable meanings of 'public opinion' (Hancock 2004; Gleeson 2005; Pratt 2008), although some of the jurors' comments in the interviews touch on the ambiguity of this term.

## Method

The results presented in this article use data from the 2009–2010 Tasmanian Jury Sentencing Study. This three-phase mixed method study, which sought primarily to develop a method of gauging informed public opinion on sentencing, used two sequential surveys to investigate the views of jurors in all 162 Tasmanian trials in which a verdict of guilty was returned over a two-year period from September 2007 to August 2009. Responses were obtained from jurors in 138 of these trials. These quantitative results were supplemented with 50 face-to-face interviews. In Stage 1, jurors were invited by the judge to take part in the study after a guilty verdict was returned. Before the sentence was imposed, but after hearing the sentencing submissions from the prosecution and the plea in mitigation,<sup>3</sup> the 698 participating jurors completed Questionnaire 1. Questionnaire 1 asked jurors: to indicate the sentence they thought the offender should receive; to answer questions about crime and sentencing trends; and to give their views on sentencing severity and whether they thought that judges were in touch with public opinion. Perceptions of judicial remoteness were assessed via a question that asked: ‘How in touch do you think judges are with public opinion on sentencing?’ Responses were measured on a four-point Likert scale offering four options: ‘very in touch’, ‘somewhat in touch’, ‘somewhat out of touch’, and ‘very out of touch’.

The response rate from the trials was quite even across the four main categories of offences: sex cases (36%), violence cases (37%), drugs cases (33%) and property cases (38%). The Stage 1 respondents were shown to be reasonably representative of the general population, although Australian born residents and those in the 45–65 age group were slightly overrepresented, and jurors were less likely to be unemployed and more likely to be better educated.

Of the Stage 1 jurors, 88% indicated a willingness to participate in Stage 2 and were mailed a package containing the judge’s sentencing comments, an information booklet about crime and sentencing, and a second survey. The sentence was sometimes imposed on the same day as the verdict, but more frequently it was imposed sometime later (usually days later, but six weeks later if pre-sentence reports were ordered). The package including the second survey was sent out within two weeks of the sentence being imposed. In Stage 2, 445 participants (64% of the Stage 1 total) completed and returned the second survey. Questionnaire 2 repeated the questions in the first survey about judges and sentencing practices and asked additional questions about the judge’s sentence and the sentencing remarks.

Quantitative analysis of responses to Questionnaires 1 and 2 tested the first three study hypotheses. A total of nine respondents participated in more than one trial during the study period and so they completed Questionnaires 1 and 2 more than once. These respondents were removed from the data set prior to analysis. Descriptive statistics were used to determine the percentage of jurors who believed judges were in touch/out of touch at Stages 1 and 2 (Hypothesis 1). Cross-tabs analysis was applied to compare the proportion of jurors at Stages 1 and 2 who believed judges were in touch/out of touch (Hypothesis 2) and the McNemar Test for paired samples was used to determine statistical significance. To examine the association between perceptions of judicial remoteness and punitiveness

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<sup>3</sup> It was not invariably the case that the jurors heard the sentencing submissions before completing Questionnaire 1; 75% of jurors were present for sentencing submissions. However, whether or not jurors were present for sentencing submissions had no bearing on their perceptions of judicial remoteness or the severity of their sentence choice relative to the judge’s sentence.

(study aim 3), punitiveness was measured in three different ways. First, jurors were asked at Stage 1 to select the sentence they thought was appropriate for the offender in their trial before the judge imposed sentence. The severity of the juror's sentence was determined by comparing their chosen sentence with the judge's sentence. Second, at Stage 2, jurors were asked whether they thought the judge's sentence was appropriate. Third, at both stages, jurors were also asked whether sentences in general were too tough or too lenient or about right using a four-point Likert scale. The association between perceptions of judicial remoteness and punitiveness (severity of sentence choice at Stage 1, views of the appropriateness of the judge's sentence at Stage 2, and general views about sentencing leniency) was assessed using separate cross-tabs analyses with the chi-square statistic applied to determine statistical significance.

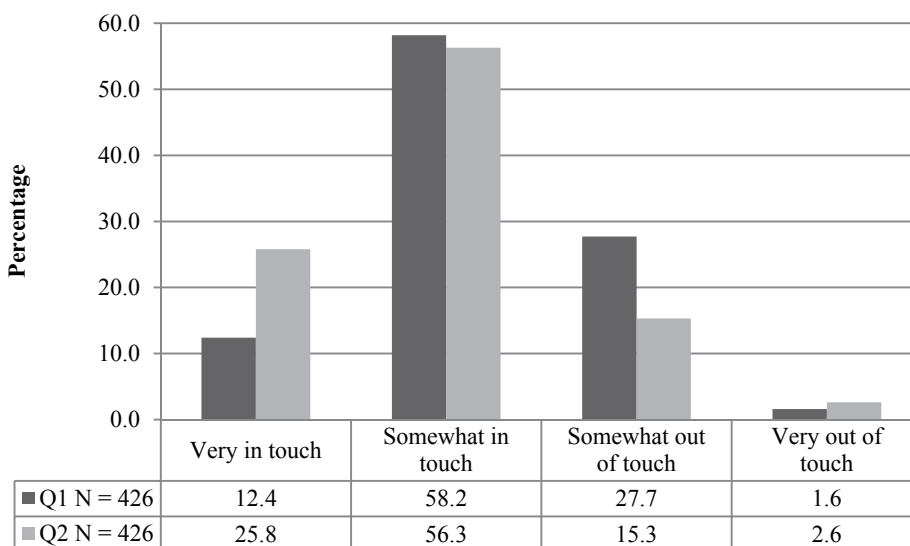
In Stage 3, 50 respondents were selected for interview based on maximising the representative spread of offence types and juror demographics. The semi-structured interviews discussed each juror's reaction to the judge's sentence and provided jurors with the opportunity to discuss, explain and reflect upon the views they had expressed in the two surveys. The Stage 3 interviews were recorded and transcribed and the data was thematically analysed using qualitative techniques to gain a deeper understanding of juror perceptions of judicial remoteness and possible reasons for a change in views. In relation to the fourth and final aim of this study, the interviewees were asked to expand on why they thought judges were, or were not, out of touch, and to reflect on the reasons for any change in view at Stage 2.

## Results

### *Jurors are less likely than members of the general public to say that judges are out of touch with public opinion on sentencing*

In both Stage 1 and Stage 2 of the study, jurors were asked: 'How in touch do you think judges are with public opinion on sentencing?' The responses presented in Figure 1 show that at Stage 1 (Q1) 29.3% of participating jurors thought judges were either 'somewhat out of touch' or 'very out of touch'.

The results are a striking contrast with those from large-scale representative surveys that find up to 80% of respondents agree that judges are out of touch 'with what ordinary people think' (eg Hough and Roberts 1998:16). It is unlikely that this difference can be explained by the difference in wording — our question specifically referred to being in touch 'with public opinion on sentencing' rather than 'with what ordinary people think'. Given that the context of the latter survey item was sentencing (eg Mackenzie et al 2012) it is likely that it would have been interpreted as referring to what ordinary people think about this topic. Our results, however, do accord with research that suggests that jurors have more confidence in judges than other members of the public (eg Matthews, Hancock and Briggs 2004:31).

**Figure 1: Jurors' opinions of whether judges are in or out of touch**

*After receiving more information, jurors are even less likely to say judges are out of touch*

As shown in Figure 1, compared with the 29.3% of jurors at Stage 1 (Q1) who thought judges were out of touch, only 17.9% thought judges were out of touch at Stage 2 (Q2) after being informed of the sentence, receiving the sentencing comments and an information booklet.<sup>4</sup> Moreover, at Stage 2 (Q2) the proportion of respondents agreeing that judges are very in touch doubled.<sup>5</sup> The pattern of response changes between Stage 1 and Stage 2 suggests that a proportion of the 'somewhat in touch' and the 'not very in touch' groups moved up one level in Likert-style responses.<sup>6</sup>

The proportion of jurors believing that judges were in touch/out of touch was very similar, regardless of whether the sample comprised all Stage 1 respondents (N = 666)<sup>7</sup> or only respondents who completed this question at both Stages 1 and 2 (N = 426).<sup>8</sup> In other words, the smaller sample of respondents who completed Stages 1 and 2 were no more likely than the sample comprising all Stage 1 respondents to think that judges were in touch at Stage 1. Hence, the results are likely to reflect experience and information, rather than case attrition.

<sup>4</sup> This difference was statistically significant using the McNemar test, N = 426, p < .001.

<sup>5</sup> This difference was statistically significant using the McNemar test, N = 426, p < .001.

<sup>6</sup> Of the jurors who said judges were 'somewhat out of touch' at Stage 1, the majority (47.5%) at Stage 2 indicated that judges were 'somewhat in touch' and 39.8% still believed judges were 'somewhat out of touch'. Of the jurors who said judges were 'somewhat in touch' at Stage 1, the majority (66.5%) still believed at Stage 2 that judges were 'somewhat in touch' and 27% indicated that judges were 'very in touch'.

<sup>7</sup> Of the original 666 jurors who completed this question at Stage 1, 12.6% indicated judges were 'very in touch', 57.2% said they were 'somewhat in touch', 27.7% said they were 'somewhat out of touch' and 2.4% indicated judges were 'very out of touch'.

<sup>8</sup> The data contained in Figure 1 was analysed using only those respondents who completed this question at both Stages 1 and 2 (N = 426).

*Are juror perceptions of judicial remoteness associated with punitiveness?*

Separate crosstabs analysis of the key variable of judicial remoteness and items measuring punitiveness of jurors (severity of sentence choice at Stage 1; views of the appropriateness of the judge’s sentence at Stage 2; and general views about sentencing leniency) revealed that, consistent with the findings of British studies (Hough and Roberts 1998; 1999), on all of these measures the more out of touch judges were perceived to be, the more punitive was the respondent.<sup>9</sup> Taking the analysis of judicial remoteness and general views of sentencing leniency as an example, Table 1 demonstrates that jurors who thought that judges were either somewhat or very out of touch were more likely to believe that sentencing was too lenient when compared with jurors who thought that judges were somewhat or very in touch. For example, at Stage 1, jurors who believed judges were somewhat (87.4%) or very (93.8%) out of touch were more likely to endorse the view that sentencing was too lenient for sex offences than jurors who believed judges were somewhat (78.9%) or very (66.3%) in touch. This pattern of findings was evident at both Stages 1 and 2 across all offence types. Furthermore, although the proportion of jurors believing that sentences were too lenient decreased between Stages 1 and 2, this change in views concerning leniency was most pronounced amongst those jurors who believed judges were very or somewhat in touch.

**Table 1: Perceptions of judicial remoteness and perceptions that sentences are too lenient by crime category**

Judicial remoteness	Study Phase	Sex (%)	Violence (%)	Property (%)	Drugs (%)
Very in touch	Stage 1 n=87	66.3	57.6	38.8	40.0
	Stage 2 n=113	58.6	48.2	31.3	32.7
Somewhat in touch	Stage 1 n=397	78.9	72.6	49.9	52.2
	Stage 2 n=241	70.5	67.1	44.6	48.8
Somewhat out of touch	Stage 1 n=178	87.4	89.6	66.7	71.4
	Stage 2 n=66	81.8	86.4	69.7	71.2
Very out of touch	Stage 1 n=34	93.8	87.5	75.1	68.8
	Stage 2 n=10	100	100	80.0	90.9
Total (too lenient)	Stage 1	80.1	75.9	53.8	56.5
	Stage 2	69.9	66.0	45.8	49.1

Note: The percentages in this table are percentage of total in/out of touch opinion for that offence.

*Understanding jurors’ perceptions of judicial remoteness*

The semi-structured interviews provided the opportunity for jurors to explain their responses to the survey questions, including questions about judicial remoteness. It also provided the opportunity to explore any changes of view on the judicial remoteness question, and the reasons for those changes. As explained, the interviewees were selected to achieve a representation of offence types and jurors. Compared to the total Stage 2 sample (n=445),

<sup>9</sup> The exception to this was the severity of the juror’s chosen sentence. Although jurors at Stage 1 (Q1) who indicated judges were out of touch (47.5%) were slightly more likely than jurors who believed judges were in touch (43.6%) to choose a more severe sentence than the judge, this difference was not statistically significant.

the interview group was a little more likely to say judges were 'somewhat out of touch' than the Stage 2 jurors as a whole (52% compared with 57%).

In the interviews, respondents were asked to explain either why they had responded that judges were 'very in touch'; 'somewhat in touch' rather than 'very in touch'; or why they had said that judges were (very or somewhat) out of touch. The discussion of the following responses illustrates the range of reasons given and the variations in meaning of jurors' understandings of the notion of judges being in touch.

The comments of jurors who said that judges were 'very in touch' reflected the views that judges were thought to be doing a good job and that they were respected for their knowledge and experience. For example Alfa 1<sup>10</sup> said:

Yes, I think so [that is, they are very in touch]. Like I was saying before, but they're the ones that do have the privilege of history, of knowing other cases and I just think that — well they have to be. And I trust that they are.

Golf 2's comment that sentencing was difficult and that judges do 'an amazing job' also reflects this feeling of trust and respect for the judiciary. Hotel 2 had responded in Survey 2 that judges were very in touch. In the interview he applauded the trial process, but when reflecting on the question of whether judges were very in touch he said that he sometimes wondered whether male judges have 'much of a conceptualisation of that kind of violation' (sexual offences of a penetrative nature).

Less than 3% of jurors said judges were 'very out of touch'. We interviewed only one juror, Uniform 2, who had expressed this view. She attributed it to the law. In her words: 'The judges have to reflect what the parliament says. So perhaps it's not the judges. Perhaps it's the parliamentarians'.

The reasons given for why judges were 'somewhat in touch' or 'somewhat out of touch' rather than 'very in touch' were similar. For one juror interviewed, it was the trappings of the office that influenced their perception; Papa 2 explained that the wearing of wigs and gowns conveys remoteness:

I guess there's just some feeling that the ivory tower type of thing ... it might have been more of the image of the way the judges dressed up ... That sort of thing, I think, just tells you he's not of the real world.

Several other jurors believed that judges become desensitised by their exposure to crime. For example, Hotel 1 said: 'Because they're involved in so many [trials] I think they do become a little hard and blasé about it ... Nothing surprises or shocks them any more so it becomes a bit of a matter of course through the day'.

The age, social background and privileged lifestyle of judges were also given as reasons why judges were perceived as not being more in touch, as the following explanations from jurors reveal:

By their very nature they've got to be a bit out of touch. One, because they're usually males, and middle class and white ... And they probably had a slightly different upbringing to a lot of people in society... Too many things have made them a little bit removed. Their educational background, their qualifications, what they do. (Alpha 2)

So many of them are in their sixties or seventies or so it seems. (Charlie 2)

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<sup>10</sup> Jurors were given code names of the NATO Military Phonetic Alphabet to preserve their anonymity.



It does not matter what industry you're in, your views are formed by the circles you revolve in. So as much as a judge is going to see the seedy side, they're really not — it's not like living in it. ... For one person or one group of people to be in touch with all facets of society, I think, is a ridiculous thing to hope for, let alone assume. So to be in the ballpark is pretty damned good as far as I am concerned. Just to have an empathy, that's fine. (Juliett 1)

Juliett 1 was not the only juror to believe that being only 'somewhat in touch' was not a criticism of judges. Victor 1 said in the survey that judges were somewhat in touch, but explained in the interview that this was not necessarily a bad thing because she did not want judges to sentence 'at the whim of popular opinion'. Golf 1's interview also shows the benefit of allowing respondents to explain and consider their survey responses. She had said that judges were only 'somewhat in touch' with public opinion, but in the interview she said: 'But then again, I'm sure they're very exposed to all elements of society, so maybe they are more in touch than I am'.

Similarly Yankee 1 said: 'I think they are probably as in touch as you can be. So I mean I think it is pretty hard to gauge what people really think ... So there's probably no way really for a Judge to be more in touch with what the people think.'

Charlie 2, who explained his qualification 'somewhat' in touch in terms of the age of most judges added: 'It's not making them a write-off as a judge .... If you had to select someone to be your judge you may well go with someone with life experience in the fifties and sixties. Not like a cricket umpire when you want their eyes'.

Alfa 2 who responded at Stage 2 that judges were somewhat out of touch said, 'I don't know if it's a good or bad thing'.

Some jurors just explained their response in terms of a gut feeling:

Well, I don't have any specific example but yes, I just thought they are a bit out of touch, can't give you an example of that. (Romeo 2)

... it's just another feeling ... (Oscar 1)

... it's just a feeling that I had over a long period of time. (Victor 2)

I suppose (my answer) was influenced by my general feeling. (Mike 1)

However, Mike 1 and Oscar 1 also indicated that their feeling that judges were only 'somewhat' in touch was not necessarily a criticism and maintained that public opinion should not be taken into account because it was uninformed.

### *Views of the presiding judge*

When discussing whether judges were in or out of touch, jurors commonly made positive comments about the presiding judge. And some jurors contrasted their general perception of judges with the judge in their trial. Foxtrot 1 responded that judges in general were 'somewhat in touch' but: 'For this particular case I thought he was very much *in* touch. There are some cases where judges are very out of touch when it comes to women and their husbands and what happens ... pretty out of touch and very misogynous'. And Romeo 2, who had said that judges were 'somewhat out of touch', said: 'I have heard over the years plenty of instances where the judges have said the most ridiculous things when sentencing people. Like the one with the woman who was unconscious and raped'. But later this juror said, in relation to his trial judge: 'I don't think he was out of touch'.

X-Ray 1 said (in Stage 2) that judges were somewhat in touch, but in interview he said: 'Look, I must confess that [the judge] was terrific. Very balanced and fair ...'. Oscar 1, who had said judges were somewhat in touch and that this was 'just another feeling' said: 'On listening to the judge on the day ... he was certainly in the ballpark as to what he was saying. He must have known quite a bit'. Papa 2 thought that judges were 'not in the real world', but nevertheless thought that her judge 'certainly seemed to be in full grasp of exactly what happened.'

Uniform 2 was the only juror we interviewed who said that judges were very out of touch. But she also said in relation to her judge: 'He was alright. I think he was okay. I am happy with what he did'.

In summary, judicial dress, the age and social background of judges, their overexposure to crime or just a 'gut feeling' were offered as explanations of jurors' perceptions of why judges were not entirely in touch with public opinion. Some jurors did not regard this remoteness from public opinion as a criticism. Others commented that, despite their views about judges in general, their particular judge was not out of touch.

### *Changing opinions at Stage 2*

If jurors had changed their views between Stage 1 and Stage 2 on the judicial remoteness question, they were asked at the interview why they had done so. Almost half of the jurors interviewed had changed their opinion, and most (all but four) were more likely to say judges were in touch at Stage 2. Two jurors specifically mentioned reading the booklet as a reason for the change; two others mentioned reading the sentencing comments. Others made it clear that the full experience of the trial and the sentence had led to them to be more positive about judges. For example, Echo 2 said: 'I think that just by going through the process of the case, it made you realise how seriously they do take it, like how much work the judge does'.

Golf 2 said his view changed from 'somewhat in touch' to 'very in touch' because 'I had time to think about the question and delve deeper'. Others had more difficulty in explaining their change of view, particularly between somewhat out of touch and somewhat in touch. However, the overall impression was that general satisfaction with the way the judge conducted the trial and the sentencing information received explained the more favourable perception of judges at Stage 2.

## **Discussion**

Surveys that report perceptions that judges are out of touch cause concern, 'not just for the sake of the frail judicial ego', but also because propagating such reports has an impact on public confidence in the criminal justice system (Bathurst 2012:56). Public confidence in the criminal justice system is a concern because it may, in turn, affect whether crimes are reported, whether witnesses cooperate with the police and prosecuting authorities, and whether jurors attend for jury service. Moreover, in the public consciousness, the criminal justice system is the most visible aspect of the legal system and faith in this most prominent part of the system is likely to determine faith in the whole. Chief Justice Bathurst expressed concern that trade and commerce, as well as investment in development and infrastructure could be affected if confidence in the legal system and the rule of law is undermined. So, 'perception matters' (Bathurst 2012:56). In addition, it is important that courts are seen as a legitimate authority. If they lose public trust, they lose their perceived legitimacy and public

commitment to the rule of law may be weakened and the ability of the courts to effectively censure offenders may suffer (Hough and Roberts 2012:279).

It is an easy step for commentators in the media to jump from reports that the public perceives judges to be 'out of touch', to assuming that judges are, in fact, out of touch with the community. Consequently, a common response to the surveys reporting perceptions that judges are out of touch, has been to challenge the truth of this view. A number of judges have disputed that their general experience of life is narrower than other occupational groups (Gleeson 2005:241; de Jersey 2006:5; Bathurst 2012:55). The results of the Tasmanian Jury Study reported in this article provide an informed perspective on the question of judicial remoteness. The results suggest that ordinary people, when they are informed by jury service, do not think that judges are out of touch with public opinion on sentencing. This is contrary to media claims that judges are out of touch with the public on sentencing and the results of representative surveys that invariably report that judges are out of touch with what ordinary people think. Participants in this study had sat through a trial. They all had at least some firsthand knowledge of judges. In addition, following the trial, they had usually listened to the sentencing proceedings. At Stage 1, although they had no knowledge of the sentence imposed in their trial, only 30% said judges were out of touch. It contrasts markedly with representative survey findings that report that most people think judges are out of touch with what ordinary people think (80% in the British Crime Surveys: Mirrlees-Black 2001; and 58% in the Australia-wide survey of public confidence in sentencing: Mackenzie et al 2012:52). So our first hypothesis, that jurors would be less likely than members of the general public to perceive judges as being out of touch, was confirmed by our results. While at this Stage, jurors had little knowledge of judicial sentencing practice, the trial experience appears to have elicited a response from jurors that is less critical of judicial sentencing than responses from the general public.

In the second survey, respondents had not only the experience of participating in the trial and receiving a copy of the sentencing remarks, they had also been given information on the range of sentences for the most common offences and an indication of the proportion of cases in which custodial sentences are imposed and the range and the median custodial sentence for the offence for which the offender in their trial had been convicted. They were, therefore, in a position to put the offender's crime into the context of sentences for other offences of the same kind and the most common crimes overall. Rather than being left with the view that judges were out of touch with public opinion on sentencing, 82% reported that judges were in touch at Stage 2. Even allowing for 'demand characteristics' or suggestion effects, the fact that the proportion of respondents who agreed that judges were 'very in touch' with public opinion on sentencing doubled is striking. Our second hypothesis, that the effect of information (general sentencing information and the judge's sentencing comments), would lead to a more favourable perception of judges, was also supported. In addition, our results supported the third hypothesis, that the perception that judges are out of touch is related to perceptions that sentences are too lenient and other measures of punitiveness and thus, were consistent with the findings of previous research (Hough and Roberts 1999; Mirrlees-Black 2001; Mackenzie et al 2012).

The interviews allowed a qualitative investigation of the responses given in the surveys and allowed jurors to explain their reasons for their survey responses. The comments of those who said that judges were very in touch reflected their confidence and trust in judges. The only juror interviewed who thought that judges were very out of touch attributed this to the outdated laws. Also, like most with this view, she said sentences were much too lenient

for each offence type at Stage 1 and 2.<sup>11</sup> Explanations for why judges were said to be out of touch were, to some extent, predictable: wigs and gowns, age, social position, impressions from the media. Less predictably, it became apparent in the interviews that the response that judges were partly out of touch with public opinion was not necessarily always a criticism, at least as a more considered view. Those jurors who disapproved of popular punitiveness did not want judges to 'be in touch' with this aspect of the public's views because they saw the public as uninformed.

The assertion that judges are out of touch is generally interpreted as a criticism of judges. As a top-of-the-head response it no doubt is and this is supported by the association between the view that judges are out of touch and the perception that sentences are too lenient. However, the interviews showed that, as a more informed and considered view, the response that judges are out of touch does not always imply criticism of judges. The interviews demonstrate that it can amount to an acceptance that judges, due to their position, are necessarily somewhat remote from the concerns of ordinary people; or it can be a reflection of the view that judges should not be in touch with uninformed public opinion. Alternatively, when asked to explain why they responded that judges are out of touch, respondents may reconsider their former views and decide that perhaps judges, with their exposure to offenders and victims in criminal proceedings, are not so out of touch. Not only did the views of jurors moderate and become more favourable to judges as they became more informed, some even questioned whether being out of touch was a criticism. Our finding that remoteness is not necessarily a criticism resonates with Dutch research that has found that: first, while most members of the public (84%) thought sentences were too lenient, most also gave positive evaluations of judges; and second, that the vast majority of those claiming that sentences were too lenient also agreed that judges should keep their distance from popular opinion in specific cases. Another relevant finding was that 75% agreed that, in the eyes of the general public, judges' sentences will never be harsh enough (de Keijser, van Koppen and Elffers 2007:142). In an earlier study, they found that while members of the public perceive judges to be rather unresponsive and slightly isolated, they also consider that to safeguard their independence, judges should isolate themselves from public opinion and should not sentence an offence more harshly when there is public outrage about it (Elffers and de Keijser 2007). These findings were interpreted as showing not only that negative public attitudes towards severity in sentencing can nevertheless be consistent with positive evaluations of judges, but also that the public is willing to accept a gap between judges and the public in the severity of sentences (Elffers and de Keijser 2007; de Keijser, van Koppen and Elffers 2007:157; de Keijser and Elffers 2009:48).

Our study did not include questions designed to explore whether or not being out touch was a criticism of judges or to find out how the concept of 'public opinion' was interpreted. Additional questions on these issues would provide a deeper understanding of the extent to which judicial remoteness is expected and accepted.

The other finding that can be used to question the claim that judges are out of touch is the finding of a 'perception gap' between jurors' views about the judge in their particular case and their general views about judges as a group. Even if some respondents thought that judges were 'somewhat' or 'very' out of touch, the qualitative interviews showed that this characterisation was not necessarily applied to the judge who had tried the case. So, despite a perception that judges in general were to some extent remote, some respondents, based on their firsthand experience of judges, were not willing to label their own judge in the same

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<sup>11</sup> For example, over 80% of jurors who thought that judges were very out of touch at Stage 1 also said that sentences for sex offences were much too lenient, compared with less than half of all jurors.

way. In Hutton's words, 'perspective varies from the global to the local' (Hutton 2005:246). This finding has parallels with previously reported findings from the Tasmanian Jury Study in relation to general questions about sentencing lenience and the sentence imposed in the particular case (Warner and Davis 2012).

While it is likely that public opinion surveys and polls will continue to ask members of the public whether judges are out of touch, the Tasmanian Jury Study demonstrates that the results of these surveys should be interpreted with caution. An opinion that judges are out of touch is, of course, an opinion and not a fact — although the media tend sometimes to transform the fact about perceptions into a fact about judges. However, an opinion is an inference drawn from facts a person has seen, heard or been told, and not all opinions are equal.<sup>12</sup> They can be informed or under- or ill-informed depending on the factual basis for the inference. Better informed opinion is more valuable. The views of jurors who have observed a judge in action in a trial are likely to be better informed than the views of the general public who lack this experience.

Highlighting the need for caution in accepting top-of-the-head responses about judicial remoteness is not a defence of judges; nor is it a claim that they are in touch with the community. It does not deny the important role of judicial education programs that are aimed at ensuring that: judges are aware of social issues such as unemployment and housing; they are well-informed about the dynamics of family violence, sexual abuse and victim behaviour; and they understand racial and gender discrimination issues. Judicial gaffes have the effect of supporting the perception that judges are aloof and fail to engage properly with social issues. More importantly, any misunderstanding of issues, such as the dynamics of sexual offending, can undermine law reform efforts to address the legal system's failures to manage sex offence allegations appropriately. And there are strong arguments for continuing to reform judicial appointments processes so that the judiciary is drawn from more diverse social and ethnic backgrounds.

The point made in this article is that assertions that judges are out of touch are commonly made in the context of the criticism that sentences are too lenient. The problem is that public opinion surveys that suggest judges are out of touch with public opinion can be used to endorse the need for punitive measures. The survey question 'Are judges out of touch with what ordinary people think?' is no doubt a useful measure of public confidence in the courts and judicial sentencing. However, because it is so often linked with the assertion that sentences are too lenient, there is the danger that harsher sentencing measures that involve restrictions on judicial discretion will be seen to be the appropriate response to community perceptions of judicial remoteness and lenient sentencing, if not an excuse for punitive policies. The results of this study challenge this response. This should not be read as denigrating the inclusion of the public voice in criminal justice. However, while acknowledging that caution is needed in placing too much faith on the power of knowledge and deliberation to transform opinion in a less punitive direction (Hogg 2012), more sophisticated ways of measuring informed public opinion and 'giving the public a fair hearing' (Editorial 2011) are needed than simple reliance on top-of-the-head responses to surveys.

<sup>12</sup> In the context of the admissibility of opinion evidence, the law is required to make the distinction between fact and opinion. Decisional law and legal commentators acknowledge that the distinction can be a difficult one. However, an opinion that a judge is out of touch is clearly an opinion, not a fact. A psychologist would, no doubt, refer to such an opinion as an 'attitude'. The point is the same, however. An attitude, defined as a summary evaluation of an object of thought (Bohner and Wänke 2009:4) is based on experience and information.

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