THEORY, EVIDENCE AND EMOTION[*]

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When we pay our respects to the traditional owners and custodians of this land, past and present, we think of the millennia during which laws have governed this country. By comparison, the life of statesman and jurist Sir Samuel Griffith is a tiny fraction. Griffith wrote our nation's Constitution and our State's Criminal Code. The life of Michael Whincop was much shorter than that of Griffith. His works are also enduring. Recently, Professor Getzler from Oxford gave a brilliant lecture about intractable issues in the law of fiduciaries, and surveyed the theories of leading judges and scholars from around the world. He nominated Professor Whincop as having proposed the best answer to a problem. So tonight we do not just remember Michael Whincop: we acknowledge the enduring influence of his ideas and work.

Rather than join the fray in debates about fiduciary duties, I want to address theory, evidence and emotion, particularly in the criminal law. In 1976, as a first year law student at the only law school in Queensland, I was taught criminal law by Professor O'Regan. He later became a leader of the Bar, Chair of the Criminal Justice Commission and a Doctor of Laws from this University. My practical legal training in criminal law was at the Grosvenor School of Law, then a respectable hotel, where barristers like Spender and Cuthbert would instruct articled clerks about *voir dires*. But I only really started to understand the criminal law when I was sent to jail.

I was sent to jail, along with other students, by an Oxford Professor who thought that we should have seminars with inmates at the local prison. In many ways it was like a scene from the comedy series *Porridge*. But these were actual villains, upon whom we tested theories taught in the classroom. Steve was a professional break and enter artist who stole from the wealthy residents of Henley-on-Thames. One day I asked him a question along these lines:

> "Q: Steve we get taught about deterrence. The theory is that the punishment should fit the crime and deter you from offending again.

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[*] Michael Whincop Memorial Lecture, Griffith University, 25 October 2014.

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When you are about to break into someone's place, do you ever think about how long you'll get if you are caught?

Steve: Well you never think about getting caught: if you did you'd lose your bottle.

Q: Well think about it now, how long would you expect to get for what you did?

Steve: Well, since the last time I was inside I knocked off about 40,000 worth of gear, so I'd expect to do three years. But I'm in for 18 months. So, like, I suppose I got a result then."

I do not want to suggest that this anecdote about Steve is sufficient evidence to discredit the theory of deterrence. But it taught me something about the limits of deterrence theory in cases of the most premeditated and calculated of crimes.

The evidence about deterrence, when it works and when it does not, has been assembled by researchers and scholars over the decades, including Griffith's Professor Ross Homel. The body of evidence and analysis is huge. The literature continues to grow, and although we do not know everything about deterrence, we can be fairly certain of some things. As Professor Homel succinctly wrote:

> "To put it bluntly, more and longer prison terms do not create a safer society (except perhaps temporarily while some prolific offenders are taken off the streets), and truly effective policing decreases rather increases the numbers of offenders dealt with by the courts."[1]

In 1999 von Hirsh and others published an analysis of research about criminal deterrence and sentence severity. They reported that studies did not provide a valid basis to infer how much *extra* deterrence is achieved by increasing the severity of punishment. There were a number of possible reasons to account for "severity's uncertain and seemingly limited effects" in reducing crime rates.[2]

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1 Ross Homel, "An Alternative Vision for Crime Control" (May 2009) *Proctor* 17-19, 18.

2 Andrew Von Hirsch et. al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford: Hart Publishing, 1999), 44-47 ("Von Hirsch").

One lesson from this and other research is that our safety from crime is far more assured by increasing the risk of detection and conviction than by increasing sentences. This reflects the difference between, what in the literature is called, absolute general deterrence and marginal general deterrence. Absolute general deterrence is the idea that the fact there is detection and punishment of crime is a deterrent.[3] Marginal general deterrence is the idea that increasing the punishment for a particular offence provides a greater deterrent effect.

In short the research indicates that our safety depends more on the professionalism, patience and bravery of our police than on judges handing out higher sentences. And we are fortunate to have a police force in this country, which, in the main and by comparison with other countries, is professional, patient in dealing with individuals better handled by social workers than police, and brave to the point of risking and losing their lives.

Despite the limitations on marginal general deterrence as a tool in preventing many kinds of crime, and the poor evidence that increasing sentences has much of an influence on altering behaviour, judges like me are fairly wedded to the theory. We adhere to the theory that a sentence of a certain length will not only deter the defendant from committing the same or a similar offence, but that it will deter others. There is a clear logical or intuitive appeal to this reasoning. That appeal is demonstrated by a series of simple propositions put forward by Bagaric and Alexander:

1) Humans have a strong desire to avoid hardships or pain;
2) Criminal sanctions normally involve the imposition of hardships or pain;
3) Imposing pain on offenders illustrates to people the adverse consequences stemming from criminal conduct;
4) People will avoid engaging in conduct that risks pain being imposed on them;
5) The greater the potential pain, the stronger the desire to avoid being subjected to it.[4]

For example, we adopt the theory that sentencing 19 year olds with little or no criminal history and good prospects of rehabilitation to jail for three to five years imprisonment for selling a fairly small number of ecstasy tablets for a profit of some hundred dollars will deter

[3] For a dramatic example see the Melbourne police strike example in 1923 referred to in Mirko Bagaric and Theo Alexander, "(Marginal) general deterrence doesn't work – and what it means for sentencing" (2011) 35(5) *Criminal Law Journal* 269-283.

[4] Ibid at 269; see also Von Hirsch at 45.

other 19 year olds from dealing in that dangerous drug. Part of the theory is that the sentences we pass will be reported, whereas in fact the judiciary is portrayed in the media as incredibly lenient. The theory also rests on the assumption that if these routine cases ever are reported, other 19 year olds will read about it in the newspapers. Another doubtful assumption.

This is not to say that young people who sell drugs, even for a small profit, should not be sent to jail. There may be good reasons to do so. The evidence, however, is that increasing penalties have at best a small impact by way of general deterrence.

When young lives are lost to a drunken king hit, the community naturally expects the punishment to fit the crime. And so it was that there was public upset when a judge in Sydney in such a case imposed a sentence which was perceived by some in the community to be too lenient. The sentence was appealed. The NSW legislature did not wait for the criminal justice system to take its course, and introduced new laws and new penalties. As it happened, the sentence was increased by the NSW Court of Criminal Appeal. The appeal court said offences involving alcohol-fuelled violence called for "an emphatic sentencing response to give particular effect to the need for denunciation, punishment and general deterrence".[5]

One might question, in the light of the research evidence, whether increasing sentences in such cases will have any real deterrent effect. Does a drunken youth really perform the calculus: if I punch this bloke and, by chance, kill him, I'll get 7 years, so I'll do it; but if it was 10 or 12 years I wouldn't. The absence of this type of rational thinking in cases of drunken offending undermines the intuitive "feel" that increasing sentences should be effective in deterring crime. Clearly, we need to limit alcohol fuelled violence. The policies to combat that problem are matters for governments, informed by evidence of what works in other places and the analysis of researchers and social scientists. I am not questioning that someone who kills another should serve the kinds of sentences that the NSW Court of Appeal imposed. My point is that general deterrence theory is not a compelling justification for such

[5] *R v Loveridge* [2014] NSWCCA 120 at [216]. The Court went on to say at [217] that "General deterrence and retribution are elements that must assume greater importance when the crime in question is a serious one, has been committed in a particularly grave form and its contemporary prevalence is the cause of considerable disquiet".

long sentences. Their justification may rest on the fact that a life has been lost, and that it is simply just to punish someone for violently taking another's life.

Section 9 of the *Penalties and Sentences Act* 1992 (Qld) lists the purposes of sentencing as:

(a) to punish the offender to an extent or in a way that is just in all the circumstances; or
(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
(c) to deter the offender or other persons from committing the same or a similar offence; or
(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
(e) to protect the Queensland community from the offender.

Purposes (a) and (d) have a high claim in cases where a life has been taken, especially a young life, which denies the victim the opportunity to flourish. Retribution and denunciation featured in what the New South Wales Court of Criminal Appeal said about sentences in cases of alcohol-fuelled violence. But it also nominated general deterrence.

Perhaps the traction which the theory of general deterrence has in these cases, despite the lack of a strong evidence base, is the hope, dare I say it, the emotion, of the victim's family, the public and judges that the life lost will not have been in vain; that other families will be spared the same misery by a sentence that deters others. There may not be much evidence to support the theory of general deterrence in such a case, but the theory has an emotional quality that cannot be ignored.

The challenge for the criminal justice system is how we reconcile emotion and empirical analysis. I do not want to talk at length about the limits, based on the evidence, of deterrence theory in many categories of crime. A more interesting topic is the evidence, or lack of it, that the sentences that are imposed advance the important purpose of rehabilitation. In making that comment I am not singling out sentences of imprisonment and the evidence that, in the main, prison as we know it does not rehabilitate most offenders. Judges are sometimes persuaded to sentence individuals to immediate release on parole or probation on the theory that supervision in the community will help rehabilitate the offender. But what supervision

and support is in fact given to those who need it? Does such supervision work? What is the best kind of supervision and support for certain offenders? All this calls for evidence. [6]

In July, many judges from across the country heard an address by the Northern Territory Attorney-General about steps he has taken to ensure that prisoners get employment skills and a job before they leave jail. They transition out of jail with a job. As he said, for the first time in their lives many of them have something to lose by re-offending, and the preliminary findings about recidivism rates are encouraging.

So rehabilitation can work in some cases to the benefit of offenders and the broader community by cutting recidivism.[7]

Which custodial programs and non-custodial programs work best, and why they work is something about which we need evidence and analysis by independent bodies and academic researchers.

For a short time we had a Sentencing Council which showed its independence in its September 2011 report on mandatory minimum standard non-parole periods. Without a Sentencing Council to assemble the evidence and to analyse it, the community must rely on the independence of universities and researchers to test theories and to explain what works. [8]

Crime prevention

I do not wish to suggest that crime prevention is all about police, courts, prisons and parole officers. Crime prevention must address the social and psychological conditions which cause disadvantage, alienation and misery. It is about the causes of crime, the welfare of whole communities and whether individuals in disadvantaged communities have the opportunity to

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6 Such research is being undertaken in other jurisdictions, for example the Ombudsman in Victoria recently launched an investigation into the level of rehabilitation offered to a record number of prisoners: "Ombudsman to investigate prison rehabilitation services" *The Age* (14 July 2014).

7 There is at least some evidence that rehabilitation might not be as effective as initially thought, see Mirko Bagaric and Theo Alexander, "*The capacity of criminal sanctions to shape behaviour of offenders: Specific deterrence doesn't work, rehabilitation might and the implications for sentencing*" (2012) 36(3) *Criminal Law Journal* 159-172.

8 This research includes the utility of forms of non-adversarial justice see Michael King et. al., "*Non-Adversial Justice*" (Sydney: The Federation Press, 2nd ed, 2014).

flourish. Crime is prevented by giving individuals a real chance to fulfil the responsibility to make their lives a successful performance. As Professor Homel wrote:

> "The criminological research evidence points in a consistent direction- effective crime prevention programs give young people a sense of being citizens rather than outsiders, of having a stake in mainstream society rather than having to make do on the margins.
>
> Effective prevention programs emphasise 'getting in early' before crime problems emerge or become entrenched, utilising all the tools that modern research and enlightened practice can offer, such as enriched preschool programs, sensitive, holistic and responsive family support programs for the most vulnerable, targeted home visiting programs by health professionals to socially disadvantaged teenaged mothers, quality parent training programs such as Triple-P, and Parents and Children's centres located in schools that can strengthen the links between schools and community and provide a base for a plethora of evidence-based programs that improve the wellbeing of whole schools and neighbourhoods, not just the at risk minority."[9]

Preventive justice in theory and in practice

Recently, in giving the Australian Academy of Law Address in Brisbane, Professor Lucia Zedner FBA explored the theory and contemporary practice of preventive justice.[10] She gave a non-exhaustive list of some of the most obvious areas in which such preventive laws and measures arise:

- Preventive policing and criminal procedure;
- Civil preventive measures and civil-criminal hybrid measures, such as Anti-Social Behaviour Orders (ASBO);
- Criminal law: preparatory and pre-inchoate crimes, risk-based liability;
- Preventive sentences and preventive detention of the dangerous;

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9 Ross Homel, "An Alternative Vision for Crime Control" (May 2009) *Proctor* 17-19.

10 Lucia Zedner, "Preventive Justice and the Rule of Law : What role for the legal profession and the courts, what role of academia?" (Address to the Australian Academy of Law, Brisbane, 29 July 2014).

- Counter-terrorist measures, including criminal laws and civil preventive orders and special procedural measures, for example in the UK closed material proceedings and special advocates (i.e. security cleared lawyers permitted to see secret evidence);
- Public health law: quarantine/isolation, detention based on mental disorder;
- Immigration law: powers to detain at borders and immigration detention or removal centres.[11]

She also noted that preventive justice is not a new concept. For example, Blackstone wrote in 1753:

> "Preventive justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice."[12]

J S Mill observed in *On Liberty* that:

> "It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards. The preventive function of government, however, is far more liable to be abused, to the prejudice of liberty, than the punitory function."[13]

As for the distinction between prevention and punishment, Professor H L A Hart observed:

> "Certainly the prisoner who after serving a three-year sentence is told that his punishment is over but that a seven-year period of preventive detention awaits him and that this is a 'measure' of social protection, not a punishment, might think he was being tormented by a barren piece of conceptualism – though he might not express himself in that way".[14]

Despite this incisive observation there is still a respectable and defensible distinction between preventive and punitive measures. Such a distinction is central to the constitutional validity of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). The Act permits certain prisoners to be detained in custody or released subject to strict supervision orders after their

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11 Ibid at [5].

12 W. Blackstone, *Commentaries on the Laws of England in Four Books* (London: Routledge, 2001, 1753) Book IV, Ch. XVIII, 25.

13 J. S. Mill, *On Liberty* (Harmondsworth, Middlesex: Penguin, 1979, 1859) 165.

14 H. L. A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), 166-167.

sentences have expired on the basis that such an order is necessary to prevent future crimes and ensure community safety. [15]

When the Act was introduced in 2003 the then Attorney-General said it was not clear how many prisoners currently within the prison system would be subject to it, but said it would be "approximately a dozen or so very, very serious offenders, most of whom have been in prison for a very long time".[16] It was designed for the worst of the worst.

Currently about 150 individuals have been subject to orders under the Act.

The practical operation of the Act depends very much on risk assessments undertaken by psychiatrists. Research shows that predicting dangerousness is difficult.[17] Many of the psychiatrists who work in this field frankly acknowledge the limitations of the actuarial and clinical risk factors they apply.[18] They will express an opinion about the risk of sexual offending in the absence of a supervision order: for example, that there is a moderate risk of re-offending and that the risk would be reduced to low with a supervision order. In theory, it is the judge, not the psychiatrists, who decides whether an order will be made. But the Act, and the judges, unsurprisingly, place great store on the opinions of experts. The experts express views about risk, but it is the judge who must, based on a list of prescribed matters, decide if there is an "unacceptable risk" that the prisoner will commit a serious sexual offence. In many cases the answer is obvious, and a continuing detention order is made. In many cases the parties agree that adequate protection of the community can be ensured by a supervision order.

Judges are naturally cautious, based on equally cautious psychiatric opinions. Only rarely are orders not made.

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15 *Fardon v Attorney General (Queensland)* (2004) 223 CLR 575 at [20].

16 Queensland Parliament, *Hansard* (4 June 2013) 2581.

17 For an illuminating work see C. Gustavson, *Risk and Prediction of Violent Crime in Forensic Psychiatry* (Lund: Lund University, 2010).

18 As to the limitations of risk assessment see I. Coyle and R. Hanlon, "Humpty Dumpty and Risk Assessment" and also A. Birgden, "Assessing Risk for Preventive Detention of Sex Offenders" in P. Keyzer, *Preventive Detention: Asking the Fundamental Questions* (Cambridge: Intersentia, 2013); see also A. Ashworth and L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014).

Predicting the future is a fairly unfamiliar territory for judges. We tend to look back on events and transactions, analyse the evidence and decide if the plaintiff or defendant wins. Judges of appeal can review the evidence that is in and decide if a jury's verdict about past events was unreasonable. Making predictions about the future is not a familiar terrain for judges. But we do it in bail applications, and Justice Thomas reminds us that no grant of bail is risk-free.[19] Something similar has been said of supervision orders under the DP(SO) Act:

> "The Act does not contemplate that arrangements to prevent such a risk might be 'watertight'; otherwise orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."[20]

How does the DP(SO) Act operate in practice?

If you thought that I was going to answer that question, I must disappoint you. I do not know the answer, and if I did, I probably would not be able to tell you.

Does anyone really know the answer? There are many opinions, and leading scholars like Keyzer and McSherry have researched the perspectives of those "at the coalface".[21] But, so far as I am aware, there has been no independent analysis of how the Act operates in practice; an inquiry of the kind that would be undertaken by a body with the powers and resources to undertake an independent assessment of the Act's first ten years of operation.

Individual judges may gain an impression of the how the Act operates in practice, but any impression may be wrong and cannot be compared with a rigorous examination of the data. My impression is that a number of the individuals subject to the Act are indigenous men with

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19 *Williamson v Director of Public Prosecutions (Qld)* [2001] 1 Qd R 99 at 103; [1999] QCA 356 at [21].

20 *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396 at [39].

21 P. Keyzer and B. McSherry, "The preventive detention of 'dangerous' sex offenders in Australia: Perspectives at the coalface" (2013) 2 *International Journal of Criminology and Sociology* 296-305.

a troubling sense of sexual entitlement over women. Often they are alcoholics who commit opportunistic sex crimes when drunk, for example, in the course of burglary. They seem to be quite different offenders to the dozen or so offenders, typically paedophiles, at which the Act was targeted. Still, they fall within its terms, and I do not want to be taken as suggesting that they should not. These kinds of offenders are sometimes released on supervision orders containing 40 or so conditions, and one of the most important is that they abstain from alcohol and illicit drugs.

In the early days of the Act, there may have been several conditions in a supervision order. Now there are usually dozens, and many are there as a precautionary measure, which, if contravened, act like a warning light on a dashboard, or a canary in a coalmine.

Because there are so many people under the Act, and so many conditions, the Supreme Court has to deal with many applications, such as annual reviews of continuing detention orders and contravention proceedings. The contravention may be serious and will result in a continuing detention order because the individual cannot discharge an onus. But many are conceded to be of a kind that does not justify a continuing detention order. Another supervision order is made, possibly because the contravention was an unfortunate aberration. The flow of cases has been such that the Supreme Court has had to assign a judge who used to sit in the general applications list to deal with DP(SO)Act matters each Monday. An Act which was designed for a few exceptional cases generates a large number of applications which are the subject of oral judgments.

After ten years, perhaps it is time for an independent analysis of how well the Act is working, including how well the Court is performing in this difficult jurisdiction. For example, of the scores of persons who have been released into the community under supervision orders over the last ten years, how many have committed a serious sexual offence?

The natural reaction is that one would be one too many. But with the fallibility of prediction, and the number of people involved, it would not be surprising if there had been. It would not necessarily mean that the Act was not working, as intended, and or that the system of supervision orders needs to be fundamentally changed.

How well is the Act's purpose of rehabilitation being achieved? How many individuals have obtained work or qualifications, remained offence-free and established positive, long-term relationships? How have they benefitted from counselling and what kind of counselling seems to work best for certain kinds of offenders?

My present point is that neither judges nor other members of the community have that information, based upon a reliable, independent analysis of the evidence as part of an inquiry into how the Act operates in practice. An evidence-based study would aid public understanding of who are subject to the Act, how the Act works and whether it is achieving its purpose. If no independent body is given the job of assembling the evidence and analysing it, then that job falls on an already busy and under-resourced academy.

Many difficult questions arise such as:

- How do we measure success?
- What forms of accommodation, therapy and programs in the community seem to work in terms of individuals who have some prospect of being rehabilitated?
- Is it more or less successful than close supervision under parole in preventing crime and rehabilitating offenders?
- Has the system of supervision orders become a de facto parole system for sex offenders: the parole system you have when parole is practically unavailable for sex offenders?
- Does accommodating indigenous men from Far North Queensland who are not paedophiles, but alcoholics in remission, with hardened paedophiles in a precinct at Wacol aid their rehabilitation, and thereby enhance public safety?

I do not know the answers to these questions because there has been no independent analysis by a law reform commission or independent scholars who can assemble all of the evidence.

I sometimes hear media reports that a dangerous sex offender has been freed by a judge. What this means is that someone who was entitled under the law to go free at the expiry of a sentence, has been released under a supervision order that confers broad discretionary powers upon officials about where the person will live and what they will do each day. In some cases, the person will be effectively confined to a precinct beside a prison. In many ways it

may not be too different to a prison. Yet media reports of a sex offender being "freed" can mislead and unnecessarily add to public anxiety and insecurity.

Upon their release, persons under the Act are often accommodated, sometimes for many months, in what *The Courier-Mail* described as "The Devil's Lair".[22] They are housed in this precinct for months on end because of the absence of suitable accommodation in the community. This raises an interesting question: whilst the Act has a preventive, not punitive purpose, might it operate in a punitive way in practice?

Reference to overseas jurisprudence shows that the fact that detention has a preventive purpose does mean that it cannot be found to be punitive.[23] But we do not need to go overseas to find that principle. Under our constitutional law the validity of legislation is determined not just by its terms. Regard is had to its operation and effect. And so a law may be preventive in theory but punitive in practice.

Evidence-based law

Justice Weinberg has written about the place of evidence-based law in the criminal justice system.[24] Its object is to see the law as it works in practice, informed by reality. He cautions:

> "At the same time, we should remember that empirical analysis can never be sufficient, on its own, to provide a truly principled basis for policy making. There is always a role, in policy development, for what can only be described as a kind of 'intuitive', or value-based, assessment. That approach is by no means to be regarded as 'formalistic'. It is not blind faith under a different name. It is based upon rational thought, heavily influenced by experience accumulated over many years. It is the furthest thing from disconnection with reality".[25]

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22 "Inside the Devil's Lair" *The Courier Mail*, (14 December 2013).

23 *M v Germany* [2010] ECHR No 19359/04; P. Keyzer, *Preventive Detention: Asking the Fundamental Questions* (Cambridge: Intersentia, 2013) 32-38; A. Ashworth and L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014) 165-167.

24 M. Weinberg, "Evidence-based law: Its place in the criminal justice system (2014) 11(4) *Judicial Review* 415.

25 Ibid at 427.

He reminds us that, at bottom, law is a system of norms, and, on occasion, surveys and other like techniques will be a poor guide to what is, in reality, good social policy, and an even worse guide to what is principled, and morally correct. He concludes:

> "… evidence-based law presents a challenge – that of basing legislative reform and common law development upon a combination of science, and principled decision-making. Neither, taken on its own, is sufficient."

The Fall of the Platonic Guardians

When I was studying at Oxford in the early 1980s our studies were informed by Home Office Research. This research was the product of what Professor Loader described in 2006 as The Rule of the Platonic Guardians: a small network of "politicians, senior administrators, penal reformers and academic criminologists wedded to the belief that government ought to respond to crime (and public anger and anxiety about crime) in ways that, above all, seek to preserve 'civilised values'".[26] Part of the work of the Platonic guardians was to lead or at least manage public opinion on crime: public sentiment was not to be disregarded, and policy was not to get too far ahead of it.

> "But the governing disposition among Platonic guardians, shared, by government ministers up until the mid-1980s, lies in the express and implied view that untutored public sentiment towards crime is a dangerous thing – an object to be monitored and contained, steered down appropriate paths, taken on and argued with where necessary (most obviously, in this period, during the campaign to abolish capital punishment) but not to be followed, still less given governmental endorsement and expression."[27]

Professor Loader describes in the "Fall of the Platonic Guardians" the decline of the rehabilitative ideal of returning delinquents to the fold of productive democratic citizenship. It charts the influence of Thatcherism, the rise of "law and order" as an issue in elections and the advent in England of populist and punitive policies. He makes the point that, whatever one makes of its desirability, the ambition of reinstalling the Platonic Guardianship to its

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[26] Ian Loader, "Fall of the 'Platonic Guardians' Liberalism, Criminology and Political Responses to Crime in England and Wales" (July 2006) 46(4) *British Journal of Criminology* 561-586 at 563 ("Loader").

[27] Ibid at 568.

position of former dominance has become untenable. He gives reasons why Platonic guardianship cannot and should not be revived, but points to its legacies.

> "If the genie of public emotions towards crime has, indeed, been freed from the bottle, they cannot – not, at any rate, without risking counter-productive consequences – be ignored or suppressed. Rather, deliberative means must be found to 'handle' such passions. Open political debate about crime and punishment is not something that democratic societies are or should be able to shy away from. Indeed, under the right conditions, such dialogue can buttress the public reason that Platonic guardians take to be fragile, and help counter the spontaneous convictions that they fear will – once they are allowed to gain a foothold – run dangerously amok through the institutions of criminal justice. Liberal elitism rightly stood in fear of the risks of letting untutored emotions loose in the field of crime and punishment. Today, the challenge … is to nurture and sustain institutional arrangements that can allay these fears …"[28]

Closer to home, informed commentators pose the question: "Is rational law reform still possible in a shock-jock tabloid world"?[29] I should mention that when I was in Oxford in January and referred in a seminar to a "shock-jock" no one knew what a shock-jock was.

Public opinion on sentencing: recent research in Australia

The former Chief Justice of New South Wales, James Spigelman AC QC, once commented "sentencing engages the interest, and sometimes, the passion, of the public at large more than anything else judges do".[30] In recent years in Australia a number of studies have tried to measure public opinion, through surveys, focus groups, deliberative polls and other means.[31] Of great interest has been Professor Warner's Tasmanian Juror Study. The main finding of the study was:

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28 Ibid at 582.

29 David Brown, "Is rational law reform still possible in a shock-jock tabloid world?" *The Conversation* (15 August 2014).

30 J. Spigelman AC, "A New Way to Sentence for Serious Crime" (Address for the annual opening of the law term of the Law Society of NSW Sydney, 31 January 2005).

31 A summary of recent research can be found in a brief by the NSW Parliamentary Research Service: L. Roth, "Public Opinion on Sentencing: Recent Research in Australia" *NSW Parliamentary Research Service* (e-brief 8 of 2014, June 2014), accessible at: https://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/PublicopinionsentencingrecentresearchinAustralia/$File/public%20opinion%20on%20sentencing.pdf.

> "… *informed members of the public overwhelmingly approve of the sentences given by our judges*. Based on the findings from 138 trials, jurors who have judged the defendant guilty are more likely to select a more lenient sentence than a harsher sentence than the judge. Moreover, when they are informed of the sentence, they are highly likely to endorse it. The fact that this is the judgement of jurors makes it a strong endorsement of judicial sentencing. It is an important finding which should be heeded by politicians and policy makers. It suggests strongly that jury surveys can help counter the 'comedy of errors' – the situation in which policy and practice is not based upon a proper understanding of public opinion and public opinion is not based on a proper understanding of policy and practice."[32]

The reference to the "comedy of errors" echoes the title of an article by David Green of the University of Cambridge.[33] He wrote that "mass-mediated portrayals of what the public want and ubiquitous self-selected opinion polls serve as common surrogates for informed public opinion".[34]

Professor Warner has embarked upon a similar national jury study which is hoped to involve the higher courts in all Sates and Territories. Its work in Queensland may depend upon the State Attorney-General bringing an application to allow jurors to be surveyed.

Emotions

The Platonic Guardians have fallen, at least in England. As Professor Loader observes, "the genie of public opinion is out of the bottle". He writes:

> "Public discourse on crime has in the process assumed a high emotional charge, as politicians react to the mass-mediated anger, indignation and

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[32] K. Warner et. al., *Jury Sentencing Survey* (Report to the Criminology Research Council, April 2010) 95-95; see also K. Warner, et. al., "Public judgement on sentencing: Final results from the Tasmanian Jury Sentencing Study" (February 2011) *Trends and Issues in Crime and Criminal Justice* 407. The President of our Court of Appeal, Justice Margaret McMurdo, wrote in July 2014 to a Parliamentary Committee about the study and what might be discerned from appeals against sentence from the District Court and the Supreme Court.

[33] D. Green, "Public Opinion versus Public Judgement about Crime: Correcting the Comedy of Errors" (2006) 46 *Brit J* (2006) 46(1) *British Journal of Criminology* 131.

[34] Ibid at 131.

> anxieties of the public by promising to 'get tough' with offenders and 'crack down' on crime. A host of recent crime control developments - spiralling prison populations, minimum mandatory sentences, controls on sex offenders, zero tolerance policing, anti-social behaviour orders - all attest to a new political consensus under which governments seek to give voice and effect to, rather than temper, the impassioned demands of citizens - and especially victims. In short, the temperature of penal politics has moved from 'cool' to 'hot'."[35]

None of this should come as a surprise, since, as Durkheim taught, passion is "the soul of punishment". Professor Loader critically compares three candidates for addressing the individual and collective emotions that crime and punishment arouse.

The first is the Cognitive Deficit Model, which attributes much of the anger that people feel towards "lenient" penal practices to their lack of information about how the criminal justice system works and consequent misunderstanding of it.[36]

The second is the Insulation Model, which is "less sanguine about the prospects of tempering these [public] passions with greater knowledge, opting instead for an approach that shields the criminal justice and penal system from the democratic political process and the pressure-cooker of public emotion".[37]

The third, described as The Redirection Model, builds on and extends the first two perspectives. It takes as its starting point the "inescapable centrality of the emotions to the question of how societies control crime and punish offenders".[38] It engages with citizens, and the aim of achieving "policy outcomes that can be said to rest on some defensible, deliberatively produced conception of the common good".[39] It seeks to channel the emotional experiences and claims of citizens into institutional processes of public reason".[40]

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35 I. Loader, "Playing with Fire? Democracy and the Emotions of Crime and Punishment" in S. Karstedt, I. Loader and H. Strong (eds), *Emotions, Crime and Justice* eds (Oxford: Hart Publishing, 2011) 347.
36 Ibid.
37 Ibid at 352.
38 Ibid at 356.
39 Ibid at 357.
40 Ibid at 358.

He concludes:

> "By designing democratic systems that acknowledge the legitimacy of how people feel towards matters they care deeply about, and enable them to participate in ways that deepen their knowledge of the issues and protagonists involved, one stands a better chance of dispelling lay anxiety, anger and resentment and loosening popular attachment to punitive penal outcomes, than by keeping 'the public' penned in as spectators screaming from the sidelines, or enlisting experts to tell them more about the drama they are watching."[41]

I commend Professor Loader's work to you, and I will make two observations of my own about public opinion.

First, as with all good legal submissions, the conclusion depends on how you frame the question. For example, one might ask "Should a convicted criminal have to serve all of his sentence in jail?" and get a certain answer. If the question is framed differently, such as: "Should persons sent to jail be released into the community without any parole supervision at the end of their sentence?" you would probably get a different, and inconsistent response.

The second is that we should not assume that public opinion is necessarily punitive. As insecure as many citizens feel, and as terrorised as they may be by fear campaigns, I suspect that there would be widespread support for programs in custody which teach offenders how to read and write, and train them for employment, thereby reducing recidivism. These opinions may be influenced by hard-headed, hip-pocket concerns, like those in the United States where reforms are driven by conservatives like Mr Newt Gingrich and neo-liberals who undertake a cost-benefit analysis of mandatory sentences and mass imprisonment. However, they may reflect some deeper emotional commitment to the idea of redemption. An important historical insight was given by Soraya Ryan QC is her recent paper "The Impetus for Change" about how Queensland was the first place in the British Empire to abolish capital punishment.[42] The campaign was not driven by an elite, but by popular sentiment.

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41 Ibid at 359.

42 S. Ryan, "*The Impetus for Change : Queensland, the first in the Empire to do so – in 1922*" (2014) *Queensland Legal Yearbook*.

Out of touch or out of reach?

Chief Justice Gleeson stated in 2004 that "Judges are expected to be conspicuously responsive to community values".[43] He continued:

> "Judges live in the community. There is no empirical evidence that, as a group, their general experience of life is narrower than that of most other occupational groups. People who administer criminal justice probably see conduct that most members of the community never imagine. A Family Court judge would have a regular view of domestic relations that would throw many people into despair.
>
> When you consider the parade of life that passes before a suburban or rural magistrate, it is difficult to understand why the judiciary, as a class, might be regarded as isolated from reality."[44]

He addressed the charge that the judiciary is "out of touch", the need to understand the meaning of the accusation and to assess its merits. He wrote:

> "Judges have no techniques for, or expertise in, assessing public opinion. Judges ordinarily do not seek to influence public opinion. As an institution, the judiciary is passive in these respects. Courts sometimes conduct surveys of litigants and lawyers for limited purposes related to their administration, and seek to inform the public about aspects of their business, or about topics such as judicial independence, but they do not sample community opinion for the purpose of informing their decision-making. And they do not set out to influence wider community values. They are neither followers nor leaders of public sentiment."[45]

Recently, Justice Keane of the High Court remarked on the trending down of crime rates across the first world and to what it might be attributed. He stated:

> "Our public discourse should be informed by awareness of these realities. But the media has little interest in publishing this information; and governments

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43 M. Gleeson, "Out of Touch or Out of Reach?" (2007)(3) *The Judicial Review* 241 at 241.
44 Ibid.
45 Ibid at 242.

> will not do it because of the political advantages adverted to by Gleeson CJ, or because it would open a debate about the doubtful value of ever more deterrence in sentencing and the mounting costs of imprisoning ever larger portions of our population."[46]

He suggested that the Judicial Conference of Australia, together with professional bodies, ensure that students and others are given materials and lectures that offer a prospect, over time, of "deterrorising our populace".[47]

A common response to often uninformed perceptions that judges are out of touch, and that sentences are generally too lenient, has been the enactment of mandatory sentences. The Parliament has the right to pass such laws. But as Chief Justice de Jersey wrote in a submission to the since disbanded Sentencing Council about a scheme for standard non-parole periods:

> "The principle of individualised justice, which requires a judge to impose a sentence that is just and appropriate in all the circumstances of the particular case, is affected by a SNPP scheme which significantly limits the discretion to depart from a prescribed non-parole period. The circumstances of the particular case may warrant a different non-parole period, which legislation may not permit.
>
> The principle of equality before the law requires similar cases to be treated similarly. Justice also requires that relevant differences between individual cases should lead to different results."

Mandatory sentencing is prevalent in the United States where "criminal statutes have limited the discretionary power of judges and juries to reach just decisions in individual cases, while the proliferation and breadth of criminal statutes have given prosecutors and the police so much enforcement discretion that they effectively define the law on the street".[48]

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46 P. A. Keane, "The Idea of the Professional Judge: The Challenges of Communication" (Speech to the Judicial Conference of Australia Colloquium, 11 October 2014) 8.

47 Ibid.

48 John Paul Stevens, "Our 'Broken System of Criminal Justice" *The New York Review of Books* (10 November 2011), referring to William J. Stuntz, *The Collapse of American Criminal Justice* (Harvard: Harvard University Press, 2011).

Curtailment of sentencing discretion does not remove discretion from the criminal justice system. It relocates it. It relocates discretion to prosecutors and police whose decisions about what charges to pursue are not as public or as accountable as the exercise of a judicial discretion, which is open to appeal.

Mandatory sentences are one response to perceived leniency in sentencing and, as Nicholas Cowdery AM QC noted, they often occur when government "reacts to disproportionate media treatment of particular cases".[49] The legislation that was prompted by the *Loveridge* case in New South Wales was enacted without waiting for the outcome of the appeal in that particular case.

Responding to what the public wants

In Queensland the Court of Appeal delivered an important judgment, and some might say a much-needed civics lesson, after the Premier was reported as saying that he wanted "the Queensland judiciary to start realising what the community wants and act accordingly".[50] The Court explained that judges cannot base their decisions on, or be affected by, potential political implications and media pressures.[51] Others who have addressed the independence of the judiciary remind us that the duty of a judge is to administer justice according to the law, without fear or favour, and without regard to the wishes or policy of the executive government.[52]

Certain American judges who stand for re-election must seek popular approval, with the aid of millions of dollars donated by vested interests. They must make judicial decisions that are popular, lest they become the subject of negative campaign attack ads. In this country we have avoided that kind of corruption. We are not compelled to make decisions that please the government or which please the general public.

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49 Nicholas Cowdery AM QC, *Mandatory Sentencing* (Distinguished Speakers Program, Sydney Law School, 15 May 2014).

50 *The Queen v Brown* [2013] QCA 337.

51 Ibid at [21] citing McHugh J, "Tensions between the Executive and the Judiciary" (Address to the Australian Bar Association Conference, 10 July 2002).

52 Ibid at [20] quoting Gleeson CJ, "The Role of the Judge and Becoming a Judge" (Address to the National Judicial Orientation Programme, 16 August 1998).

However if we were to imagine a country where the judicial function required a judge to make decisions which reflected popular opinion, how would popular opinion be gauged? Would it only be informed public opinion, and how would that be assessed? Are selected Letters to the Editor in newspapers, or on-line Reader's Comments an indicator of popular opinion?

In 2013, Justice Heydon, wrote an article titled "Courting Trouble" about the complex issue of how judges ascertain community attitudes and community values in a "multicultural, non-theocratic and non-totalitarian society that is pluralist, even fractured and often divided".[53] He wrote:

> "There is more legitimacy in accountable legislators deciding social or moral issues than non-accountable judges.
>
> And for the courts to apply what they perceive to be community values can be dangerous when those values are pernicious.
>
> The problem is similar to the use of 'public confidence' or 'community confidence' as touchstones for the sense of particular rules. Whose confidence is relevant? That of influential elites? Or journalists? Or trade unions? Or 'the masses'? To say that a particular rule will not attract public confidence is often only to say, 'I dislike it'. And although it is hard to assess public opinion where secret police forces operate if not efficiently, at least with ruthless brutality, many legal measures of the Nazi regime, for example, enjoyed the confidence at least of significant sections of the public.
>
> That did not justify those measures. They were not creditable either to the government that carried them out or the public that applauded them. There are some types of governmental and private conduct that the courts ought to resist, so far as the law will permit this."[54]

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53 Dyson Heydon, "Courting Trouble" *Australian Financial Review* (5 April 2013).

54 Ibid.

Giving effect to the will of Parliament, as expressed in legislation

Chief Justice Gleeson wrote:

> "Judges, of course, give effect to the will of parliament as expressed in legislation; but their duty is to behave impartially in conflicts between a citizen and the executive. There may, from time to time, be a big difference between the will of parliament as expressed in legislation and the policy of the executive government".[55]

I suspect that most judges did not need to be told this. Yet, some people, who should know better, create the fallacy that judges in this state do not understand the separation of powers and in their judgments criticise the laws passed by Parliament. One might ask for the evidence.

One of the more bizarre contributions to public discussion about judges and statutory interpretation came from Professor James Allan who wrote in *The Australian*:

> "If, like me, you want your judges committed to interpreting the legal texts in the way they were intended by the democratically elected legislature, and in line with their plain meaning, then uber-smart judges are simply those with the resources to avoid such constraints … Put differently, the unspoken premise among the 'top judges need to be the biggest brains in the room' crowd is that we want our judges to be out there pursuing social justice (or their version of it, to be a little more exact) and indulging in social engineering from the bench and that you can't do that in any plausible way unless you are really, really smart … I think that there are plenty of people out there who would make perfectly acceptable chief justices. Sure, a really smart person might make a great chief justice. But the same he or she is also more likely, in my opinion, to make an awful one."[56]

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55 M. Gleeson, "The Role of the Judge and Becoming a Judge" (Address to the National Judicial Orientation Programme, 16 August 1998) cited in *The Queen v Brown* [2013] QCA 337 at [20].

56 James Allan, "Objections must be ruled out of order" *The Australian* (2014).

In a recent speech, Justice Keane challenged us to think about Professor Allan's proposition: "a really smart person … is more likely to make an awful judge".[57] He suggested that perhaps Professor Allan should try to get out and meet more judges.

And a week after the passing of one this State's great jurists, Justice Pincus, who graced the Federal Court and the Court of Appeal, one might test Professor Allan's theory by asking: is the state of our law and our legal system better because the brilliant Bill Pincus was a judge rather than some more mediocre mind? Was it a terrible mistake to appoint as judges brilliant people like Griffith, Gibbs, Brennan, Kiefel and Keane because really smart people are more likely to make an awful judge?

One might ask Professor Allan: where is the evidence of judges indulging in social engineering in interpreting statutes? His pieces in *The Australian* do not seem to be evidence-based.

In 1976, my very smart tutor, Margaret White, taught us, and the treatises on statutory interpretation also teach, that the literal or plain meaning may not always give effect to the intention of a democratically elected legislature.

I wish the task of statutory interpretation was as easy as Professor Allan suggests. I wish my routine work in construing statutes was as simple as he thinks. If Professor Allan read the unremarkable and unreported decisions of judges of the Supreme Court, he would appreciate that many cases do not involve a statute that has a plain meaning. Legislation may be obscure in its meaning. It may state that it is intended to advance a number of purposes and not clearly disclose which purpose has priority in a particular context. We need smart people to advance arguments about the true meaning of statutory texts, and intelligent judges to interpret the text in its context. We need them so as to ensure that effect is given to the will of the Parliament, as expressed in legislation.

Anyone interested in how judges (and others) interpret texts would benefit from viewing a public lecture given by Professor Ronald Dworkin.[58] The great judge for whom Dworkin

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[57] P. A. Keane, "The Idea of the Professional Judge: The Challenges of Communication" (Speech to the Judicial Conference of Australia Colloquium, Noosa, 11 October 2014) 4.

clerked, Learned Hand, compared the task of interpreting a statute to that of interpreting a musical score, and Dworkin says much the same.

The topic of statutory interpretation brings me back to the issue of theory. One of the greatest judges in the common law world, Justice Stephen Breyer, has written about themes and theories. He does not advance a general theory of constitutional or statutory interpretation:

> "No particular theory guarantees that the interpreter can fully capture the composer's intent. It makes sense to ask a musician to emphasize one theme more than another. And one can understand an interpretation that approaches a great symphony from a 'romantic', as opposed to a 'classical', point of view. So might a judge pay greater attention to a document's democratic theme; and so might a judge view the Constitution through a more democratic lens. The matter is primarily one of approach, perspective, and emphasis. And approach, perspective, and emphasis, even if they are not theories, play a great role in law.
>
> For one thing, emphasis matters when judges face difficult questions of statutory or constitutional interpretation. All judges use similar basic tools to help them accomplish the task. They read the text's language along with related language in other parts of the document. They take account of its history, including history that shows what the language likely meant to those who wrote it. They look to tradition indicating how the relevant language was, and is, used in the law. They examine precedents interpreting the phrase, holding or suggesting what the phrase means and how it has been applied. They try to understand consequences of the interpretive alternatives, valued in terms of the phrase's purposes. But the fact that most judges agree that these basic elements – language, history, tradition, precedent, purpose, and consequence – are useful does not mean they agree about just where and how

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[58] R. Dworkin, "Is there Truth in Interpretation? Law Literature and History" (Inaugural Frederic R. and Molly S. Kellogg Biennial Lecture on Jurisprudence delivered in the Coolidge Auditorium of the Library of Congress), accessible at https://www.youtube.com/watch?v=742JyiqLhuk.

> to use them. Some judges emphasize the use of language, history, and tradition. Others emphasize purpose and consequence."[59]

An independent academy and an independent judiciary

An independent judiciary relies on the academy. Recently Lord Neuberger wrote "For a long time the relationship between judges and academics in England ... was that of ships passing in the night; ships that merely occasionally spoke to each other, with distant voices, before returning to silence". He contrasted it with the relationship between judges and academics in 21st century England:

> "The position we find ourselves in England today may not be one where the word of an academic is King, but rather one which, finally, sees judge and academic inhabiting the same world and influencing each other more openly and honestly than in the past, when the main way in which academic views could be sneaked into the courtroom was through advocates adopting those views. As Dr Braun has put it, judges and academics are now in a constructive partnership".

An independent academy may be the only institution which is able to critically analyse evidence and develop theories about what law is and how it operates in reality. I would not want my earlier remarks about evidence-based law to suggest that the role of the legal academic is simply to measure and monitor the performance of the legal system, as if the legal system was some kind of machine.

Theory is important, whether it be a theory about the purpose of punishment in the criminal law, or a theory about why the law deprive fiduciaries of benefits. Academic insights are important about how we position changes in the criminal justice system in a broader social context, and how we think about the criminal justice system.

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[59] Stephen Breyer, *Active Liberty – Interpreting our Democratic Constitution* (New York: Alfred A Knoph, 2005) 7-8.

Should the criminal justice system be seen as a machine or a morality play?

How should we conceptualise the criminal justice system? Is the criminal justice system to be viewed as some kind of impersonal machine that serves the interest of insiders while alienating and ignoring outsiders?[60] Is its emphasis on process and efficiency one that makes individuals see it as a system designed to "evacuate emotion" from the criminal process in favour of cool logic, rational arguments and the efficient pursuit of goals? What role is there for restorative justice and how might it distract from the central role of blame? Nicola Lacey wrote:

> "…a reconstructed criminal process should explicitly recognize that criminal judgment and punishment are not matters of pure reason, but are human processes deeply imbued with powerful emotions that give criminal judgments their full meaning, significance, and efficacy."[61]

"Insiders" in the justice system, like I am, benefit from these insights. How does an efficiency-obsessed criminal justice system, which depends on the speedy disposition of cases resolved by guilty pleas, accommodate emotion? For example, how should an independent judiciary respond to demands from executive government to sentence offenders by video-link?

Is the criminal process to be likened, not to a machine, but to a "morality play" based on shared values, where blame is central and judges are to denounce convicted offenders on behalf of the community? If it is, then it may be best for serious offenders to be denounced in person and in public. Otherwise, judges will be seen by offenders to be no more than a face on a video screen, and a part of a correctional system, rather than part of a criminal justice system, which works with emotions.

Perhaps only academic outsiders, perched in ivory towers at places like Griffith University or Oxford, have the perspective to describe the criminal justice machine and suggest ways to improve it. That involves a careful consideration of the role of emotions, in shaping criminal justice policy and in the trial and sentencing process.

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60 Nicola Lacey, "Humanizing the Criminal Justice Machine: Re-animated Justice or Frankenstein's Monster?" (2013) 126 *Harvard Law Review* 1299 at 1302.

61 Ibid at 1306.

I lay no claim to being a member of the "British liberal elites" who fear "untutored public sentiment" and emotion.[62] That is because I am not British. But I am guilty of being associated with such a group because I have read some of their articles, and sat in some of their seminars in ivory towers. I think I am much the better for having done so.

Popular applause or distaste

Modern Australian judges explain what we do to high school students who visit the courts, and in giving lectures like this. Others can judge whether the judiciary in Australia is out of touch, or simply out of reach. Research like that of Professor Warner may show whether sentences imposed by judges accord with informed members of the public.

Despite the civics lesson delivered by the Queensland Court of Appeal last November, calls continue for judicial decisions to better reflect popular opinion and the wishes of the executive government of the day.

Sir Matthew Hale was Chief Justice of the King's Bench from 1671 to 1676. In the 1660s he composed rules to guide his own conduct as a judge. In his book *The Rule of Law*, Lord Bingham likens these resolutions to the sort of resolution which many people make from time to time, even when it is not New Year: to get up earlier, work harder, take more exercise, drink less or whatever. One of Sir Matthew Hale's resolutions was:

> "That popular or court applause or distaste, have no influence into any thing I do in point of distribution of justice."

Of course, by "court" Hale was referring to what we would describe today as executive government.

Lord Bingham says that Hale's list, made around 350 years ago, is significant because it lays down guidelines which would still today be regarded as sound rules for the conduct of judicial office.

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[62] Ibid at 1311, citing S. Bibas, *The Machinery of Criminal Justice* (New York: Oxford University Press, 2012) 122.

As for pleasing governments, governments are frequent litigants in the courts, prosecuting cases, bringing civil claims and responding to applications for judicial review of certain exercises of executive power. In properly exercising judicial power to hold Ministers, officials and public bodies to account the judges are not usurping executive authority. They are applying the rule of law and, as Lord Bingham observes, they exercise a constitutional power which the rule of law requires that they should exercise. And as Lord Bingham said:

> "This does not of course endear them to those whose decisions are successfully challenged. Least of all does it endear them when the decision is a high-profile decision of moment to the government of the day, whatever its political colour. Governments have no more appetite for losing cases than anyone else, perhaps even less, since they believe themselves to be acting in the public interests and, in addition to the expense and disappointment of losing, they may be exposed to the taunts of their political opponents (who might, if in office, have done just the same). This is the inescapable consequence of living in a state governed by the rule of law. **There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live**."[63]

[63] Tom Bingham, *The Rule of Law* (London: Allen Lane, 2010) 65 [emphasis added].