



**The Australian & New Zealand Society  
of Criminology Conference**

*Popular Punitivism -  
The Role of the Courts in the Development of  
Criminal Justice Policies*

Address by

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It is a great honour to have been invited to give this address to the Annual Conference of the Australian and New Zealand Society of Criminology. For reasons that will be developed during my address, it is of the utmost importance that the community have the benefit of empirical research and analysis undertaken in the field of criminal justice by impartial experts. The burden of this paper is the perhaps unsurprising proposition that the development of policy and sentencing practices in this important area appears to be influenced more by the perception of populist views, than the scientific evaluation of empirical data.

I should also confess that I am a frustrated criminologist, having completed a Master's degree in which criminology was a major component. However, I had little opportunity to apply what I learnt until my appointment to the bench three years ago. Given the eminence of this audience, I hope you do not recommend the revocation of my degree after hearing this address.

Before going any further, I would like to acknowledge the traditional owners of the lands upon which we meet, the Noongar people of southwestern Australia, and pay my respects to their Elders, past and present.

### **Popular punitivism**

"Popular punitivism" is an expression which has been used in the criminological literature for some decades now. Obviously enough it reflects the support of the populous for increasingly punitive responses to criminal conduct. Later I will assess the extent to which, in a liberal democracy such as ours, popular perceptions influence those who have been elected to govern, and who wish to remain in government, in

relation to the laws which are passed by the parliamentary branch of government, and the policies which are applied by the executive branch of government. The judiciary, as the third branch of government, must not be left out of this analysis and so I will also endeavour to assess the influence which populist views have upon the judiciary. But I would like to start with some more general observations about the nature of democracy and the role of leaders in a democracy.

### **Democracy**

The word *democracy* is derived from the Greek *demokratia* which is in turn a combination of the Greek words *demos*, which refers to the population of an ancient Greek State, or the people, and the Greek word *kratos*, which means power. So, in more contemporary language, democracy is "power to the people".

The ancient Greek States are generally thought to have been the first societies to have developed democratic forms of government akin to those which we practise today, although it seems more likely that they were the first to have recorded their practices in a written form which survives today, and that forms of democracy were present in more ancient tribal communities. No form of government, including democracy, can be guaranteed to invariably produce the best outcomes. Socrates was an early victim of democracy. His eloquent and stinging criticisms of the majority which ruled ancient Athens resulted in him being put on trial for "corrupting the minds of the youth of Athens". Following his conviction by a jury, he was asked to propose his own punishment. He suggested, perhaps facetiously, free dinners for life and a wage paid by the government. Ironically, these are the conditions today enjoyed by those who are sentenced to life imprisonment. At all events, Socrates'

suggestion was rejected by the jury, who sentenced him to death, which was achieved by administering the poison Hemlock.

Democracy has had its detractors. Dr Mahathir Mohamad, the Prime Minister of Malaysia for 22 years, once observed:

"Too much democracy leads to homosexuality, moral decay, racial intolerance, economic decline, single parent families and a lax work ethic."

In other parts of the world, to paraphrase Rampaging Roy Slaven and H G Nelson "too much democracy is not enough". Perhaps the most extreme example is the US, where there appears to be great enthusiasm for electing everybody from legislators to Judges to District Attorneys to Sheriffs to dog catchers. I will return to the notion of an elected judiciary a little later.

On balance, I incline to the view expressed by Winston Churchill in 1947, when he observed that:

"... it has been said that democracy is the worst form of government except all those other forms that have been tried."

Nevertheless, democracy in action is not always a pretty sight. There is a remark commonly attributed to Otto von Bismarck to the effect that:

"If you like laws and sausages, you should never watch either one being made."

### **Leadership in a democracy**

Leadership in a democracy borders on the oxymoronic. Those elected to govern depend upon the support of the majority for their election, and upon the continuation of that support if they wish to remain in office. If

they act contrary to the wishes of the people, it is likely that they will lose their support, and therefore office. On the other hand, the role of the leader is to direct the people as to the course to be followed.

The tension in these positions is perhaps best reflected in the phrase attributed to the French politician Alexandre Auguste Ledru-Rollin in 1857 when he said:

"Eh! Je suis leur chef, il fallait bien les suivre"

which translated means:

"Oh well, I am their leader, I really ought to follow them."

Richard Milhouse Nixon might appear to be an unlikely source of inspiration on the role of an elected leader. However, it seems to me that he put it very well when he observed:

"Taking uninformed voters where they want to go is easy. Taking them where they should go is the role of the leader. To make what is unpopular popular is the supreme test of leadership." (*In the Arena 1990*)

For reasons which I will endeavour to develop, it seems to me that this neatly encapsulates the challenge which faces those in the various branches of government responsible for criminal justice law and policy in contemporary Australia. There is nothing new about that challenge. Several millennia ago, Confucius observed:

"Lead the people by laws and regulate them by penalties and the people will try to keep out of gaol, but will have no sense of shame. Lead the people by virtue and restrain them by the rules of decorum and the people will have a sense of shame and, moreover, will become good." (*The Analects*)

### **Punishment is popular**

Nor is there anything new about the popularity of punishment. In ancient times, punishment for transgressing the laws of society was swift and savage, and remains so in some contemporary societies. We are only here today because of the enthusiasm for punishment in 18<sup>th</sup> century England which resulted in those who were not sentenced to death being given very long sentences for relatively minor crimes. The prison overcrowding which followed made today's problems of overcrowding look mild. When the American colonists revolted and refused to take any more convicts from the mother country, the impetus for the settlement of Australia was created.

In more recent times we have witnessed the fierce public denunciation, vilification and demonisation of sex offenders, particularly those who offend against children. Sex offending is abhorrent and must be, and is, punished severely. The societal impulse to protect the vulnerable from sexual exploitation by the powerful is an important public moral which must be fully reflected in our laws and in the practices of our courts. But the ferocity of recent public outcries, which have in some cases led to violent attacks upon perpetrators, appear to be based on the premise that most, if not all, sex offenders are vile and depraved sub-humans preying on victims randomly chosen from the community at large. These outcries have significantly elevated levels of fear about safety in public places. But how valid is the presumption which underpins these outcries?

There are, of course, some sexual predators who match the profile underpinning these protests, and random attacks on victims in public places do occur. Public concern at those types of attack is entirely justified. But offenders of that kind and offences of that type are a small

proportion of the sex offences committed in our community. The overwhelming majority of sex offences are committed by offenders known to their victims. Most offenders are not sub-human deviants jumping out from behind the bushes on a darkened suburban street, but a family member, friend or acquaintance of the victim and with whom the victim has enjoyed a perfectly normal relationship prior to the offence. They are the people next door who otherwise appear to live perfectly normal and ordinary lives. Of course, this does not mitigate their offending behaviour - it may aggravate it.

The public demonisation of sex offenders has led to some significant legislative responses to the perceived popular view. Those responses include dangerous sexual offender legislation, where offenders who have been sentenced to a finite term of imprisonment can be detained indefinitely after the completion of their sentence on the basis of apprehended danger to the community. Legislatures have introduced these measures on the basis of community protection, and detention is only continued by a court after a finding that the offender presents an unacceptable risk to the community. This is a significant shift in penal policy. Offenders who have completed their punishment for the crimes they have committed are subjected to continued punishment, in the form of detention, because of their propensity to commit further crimes.

Other legislation which responds to the public demonisation of sex offenders is the legislation now found in most jurisdictions under which those convicted of sex offences are entered in a register and required to report regularly to police. The legislatures have introduced this legislation on the basis of the need to protect the community from predatory sexual offenders. But because the profile of most sex offenders

is quite different to the perception which underpins this legislation, most of those caught within its net are unlikely to be a danger to the public at large. Their offences have been committed against family members and friends, who will very likely be aware of their conviction and their propensities.

It also seems to me that the breadth of this legislation means that it operates in ways which, in some cases, is contrary to the objective of protecting the community from further crime. For example, there are a significant number of cases coming before our courts involving consensual sexual relationships between Aboriginal teenagers, one of whom may be under 16, in regional and remote communities. I am not here talking of predatory behaviour involving very young girls and much older boys or men. All children must, of course, be protected by the law but the consequence of a conviction is that the offender has to be labelled as a sex offender and required to report to police indefinitely on terms and conditions to be set by the police. I will refer later in this paper to the gross and worsening over-representation of indigenous people in the criminal justice system of Australia. In the light of that over-representation, one of our objectives has to be reducing the likelihood of young Aboriginal men being caught up in the justice system labelled as offenders, developing a self-image as an offender, and subjected to reporting conditions which, for cultural reasons, are less likely to be met by Aboriginal people than by non-Aboriginal people. The net result of many of these cases is that the offender is more likely to be imprisoned for breach of the reporting conditions imposed under the sex offender registration legislation, than for the original offence. There are other examples. I have even heard of one case in which a 14-year-old boy convicted of sending a saucy picture to his 12-year-old girlfriend by

mobile phone was caught up in the legislation and registered as a sex offender.

### **Imprisonment rates**

Public enthusiasm for a predominantly punitive response to crime has waxed and waned. In the decades following WWII, development of public interest in psychology and sociology seems to have been associated with increased emphasis on a rehabilitative response. However, by the 70s, punitivism appears to have reasserted itself, accompanied by emphasis on the rights of the victim - a previously neglected area of discourse. Generally speaking, imprisonment rates (ie, rates of imprisonment per head of population) have risen in most countries, including Australia. The most significant increases in imprisonment rates in Australia have occurred over the last decade. At the risk of being parochial, I will demonstrate this proposition by reference to Western Australian data.

In Western Australia between 30 June 2001 and 5 November 2009, the number of adult prisoners increased from 3170 to 4730 - that is, an increase of 49%. The prison population generally comprises two groups - those who are under sentence, and those who are on remand awaiting trial. Breaking down the figures to which I have referred, the increase in adult remandees was from 557 to 700, an increase of 26%, whereas the increase in adult sentenced prisoners was from 2613 to 4030 - namely, 54%. Growth in prisoner numbers was relatively consistent over this period, until about the middle of last year. In very general terms, prisoner numbers in Western Australia have gone from about 3700 in the middle of last year to about 4700 today. This is an increase of about 27% in under 18 months. To put this into context over the seven years between

mid 2001 and mid 2008, the prison population increased by 19%. In the week between writing the first draft of this paper and finalising it, the prison population rose by 43. I will return to this dramatic recent increase shortly.

### **Aboriginal imprisonment**

Much of the increase in prisoner numbers over this period has been as a result of a dramatic worsening of the over-representation of Aboriginal people in our prisons. In terms of remandees, over the same period in Western Australia, the number of Aboriginal remandees increased from 171 to 286 - an increase of 67%, whereas the number of non-Aboriginal remandees increased from 386 to 414 - only 7%. In relation to sentenced prisoners, the number of Aboriginal sentenced prisoners increased from 901 to 1648 - an increase of 83%, whereas the number of non-Aboriginal sentenced prisoners increased from 1712 to 2382 - namely, 39%.

This extraordinary increase in Aboriginal imprisonment is not unique to Western Australia. As Fitzgerald<sup>1</sup> points out, around Australia the number of indigenous people in prison increased from 4445 in 2001 to 6694 in 2008. This is an increase of about 50%. This increase occurred notwithstanding the many recommendations of the Royal Commission into Aboriginal Deaths in Custody, most of which were aimed at reducing the rate of Aboriginal imprisonment. It occurred over a period during which most Australian governments adhered to a policy of attempting to reduce Aboriginal imprisonment. It is clear that the policies that have been adopted by those governments have failed miserably. I am aware that Maori are similarly over-represented in the prisons of New Zealand,

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<sup>1</sup> Why are indigenous imprisonment rates rising? - Jacqueline Fitzgerald - NSW Bureau of Crime Statistics and Research Issue Paper No 41 August 2009

but must confess that I have not tracked trends in the imprisonment rates for Maori over recent years.

Fitzgerald has analysed the increment in Aboriginal imprisonment in New South Wales over that period in some detail. A significant component of that increment was an increase in remandees - by 72% - comparable to the increment in Western Australia over approximately the same period. However, interestingly, her paper reveals that the number of indigenous adults brought to court in New South Wales over the same period had fallen - from 21,156 in 2001 to 19,601 in 2007. Furthermore, the number of indigenous adults found guilty in New South Wales had fallen over the same period - from 15,023 in 2001 to 14,701 in 2007. So, over a period in which the number of adult Aboriginal people brought before the courts and convicted had reduced, in New South Wales the number of Aboriginal people denied bail and imprisoned increased significantly.

Obviously this must mean that either a higher percentage of convicted Aboriginal people were being sent to prison or prison terms were increasing, or both. Fitzgerald's analysis proved each of those things. It also showed a change in the breakdown of offences for which Aboriginal people were convicted and sentenced to imprisonment, with a significant increase in those convicted and imprisoned for "offences against justice procedures, government security and operations", and an increase in those imprisoned for the offence type of "acts intended to cause injury". So, it seems likely that the significant increase in the New South Wales Aboriginal prison population is due to a combination of changes in offending behaviour and changes in judicial behaviour, including increasing denial of bail and greater use of imprisonment.

### **The recent increase in WA**

As I have mentioned, there are about 1000 more people in prison in Western Australia today than there were in the middle of last year. The number seems to be growing exponentially. In the words of Professor Julius Sumner Miller, "Why is it so?" A significant part of the increase has come about as a result of changes in the practices and policies of the Prisoners Review Board (the WA equivalent of the Parole Board). In March of this year, when a new chairperson was appointed to that Board, the number of people on parole was a little under 1400. In October 2009, that figure had reduced to about 800. It therefore seems that about 60%, in rough terms, of the recent increase in prison numbers to which I have referred has come about as a consequence of changes in parole policies and practices.

That still leaves about 400 additional prisoners to be accounted for. Because the number on remand has actually declined in WA over the last 18 months, that increase must be due to either or both of more people being sent to prison or longer prison terms being imposed. There was a change in the law in respect of sentencing over this period, in the form of the repeal of the so-called "truth in sentencing legislation". Without going into the detail of that legislation, it is sufficient to observe that it is unlikely this legislative change would have had any significant impact on those numbers over this period, not least because of the construction which has been put on that legislation by the Court of Appeal (and with which I respectfully agree). It seems therefore that a significant component of the dramatic increase in prisoner numbers over the last 18 months is very likely due to the sentencing practices of the courts.

### **The nature of the prison intake**

Some, albeit hazy, picture of the nature of the prison intake in Western Australia over the last year is provided by an interesting answer to a parliamentary question in the Legislative Council of Western Australia. That answer reveals that over the period 1 November 2008 to 30 September 2009, 4144 distinct adult persons became sentenced prisoners. Of these, 601 were identified as having psychiatric issues on their medical status record - that is, 14.5% of the total. Another 78 were identified as having intellectual disability - that is, 1.9% of the total. Another 20, or 0.5%, had no fixed abode. Of the same group, 1423 had at least one sentenced period of imprisonment due only to fine default. This is 34.3%. This is not to say that this group was only imprisoned for fine default, as they may have been serving other sentences, but it is a group who served at least some of their prison sentence only as a consequence of fine default.

Of the same group, 2346 "have individual sentences attached to their term with maximum sentence lengths of 2 years or less, with no other individual sentence having more than 2 years maximum sentence length attached to the same term" - this is 56.6% of the total. This answer is somewhat Delphic, as it was given in a response to a question which asked for the number of prisoners sentenced to a crime "subject to a maximum penalty of 2 years or less". It is not immediately clear to me whether the answer relates to the actual sentence imposed, or the maximum sentence available to be imposed for the offence of which the offender was convicted. On any view, however, the answer indicates that when account is taken of fine defaulters and the group with shorter sentences, the majority of the prison intake over recent times has been fine defaulters and those who have been convicted of offences at the

lower end of the spectrum resulting in imprisonment. Other components of the answer indicate that a significant proportion of the intake have psychiatric or intellectual disability issues, and, of course, a very significant proportion of the intake is Aboriginal.

So, while there is, of course, no "average" prisoner, if there are any general characteristics of the recent prison intake in Western Australia, they include psychiatric disability, economic disadvantage (evidenced through an inability to pay fines), Aboriginality and offending at the lower end of the spectrum.

### **The cost of imprisonment**

This dramatic increase in prisoner numbers in Western Australia has occurred after a period in which there has been very limited expansion in prison capacity. No new prison in Western Australia has been opened since 2001. In consequence, overcrowding in the prison system of Western Australia is chronic. Although the government has announced that new prisons will be constructed, the lead time for construction of those prisons means that overcrowding is likely to continue for some years. And if the prison population continues to increase at the current rate, the new prisons announced by the government will only cover part of the increase occurring during their construction, and will not improve the current circumstances of the prison population. Aside from the departures from basic human standards caused by overcrowding, it obviously has a negative impact upon any rehabilitative component of imprisonment, by adversely impacting upon the availability of vocational training and behavioural programmes - already in short supply in Western Australia.

To put the recent increment in prison numbers in Western Australia in a financial context, adequately housing an additional 1000 prisoners would require the construction of about four medium sized prisons. The capital cost of those prisons would probably exceed \$600,000,000 depending on where they are built. The recurrent cost of keeping a prisoner in custody in Western Australia is about \$100,000 per year, so an additional 1000 prisoners give rise to recurrent expenditure of about \$100,000,000. In a State budgetary context, the Department of Correct Services competes with other State departments like health and education for limited State resources. Capital expenditure on prisons, and recurrent expenditure maintaining prisoners necessarily reduces the resources available to build hospitals and schools, and to employ doctors, nurses and teachers. It is open to question whether a properly informed public would accept that hospitals and schools should forego resources so that we can incarcerate increasing numbers of offenders who commit less serious crimes and who are socially, economically and psychiatrically disadvantaged.

These figures take no account of the indirect costs, social and financial, of imprisonment. Imprisonment disrupts families and increases welfare dependency.

### **Is imprisonment effective in reducing crime?**

People are imprisoned for a number of reasons other than deterring reoffending. Those reasons include the need to publicly denounce and appropriately punish criminal conduct and to recognise offence caused to the victims of crime in a tangible way. The impression one gets from public debate is that there is also a perception that increasing the rate at which people are sent to prison, and the length of imprisonment, will reduce criminal behaviour. The data does not support that proposition.

In terms of recidivism rates, imprisonment does not appear to be particularly effective in Western Australia. About 40% of male adult non-Aboriginal prisoners leaving prison in WA between 1 July 1998 and 30 June 2008 had returned to prison before early May 2009, and for Aboriginal prisoners, the equivalent figure was just under 70%. In the case of female adult prisoners, the rate of return to prison for non-Aboriginal prisoners over the same period was about 30%, compared to about 55% for Aboriginal prisoners.

These are very broad indicators of lack of success. A more specific indicator is obtained by comparing the recidivism rates for a cohort of offenders sentenced to prison with a cohort of similar offenders given a non-custodial sentence. A recent analysis of that kind undertaken in relation to the WA Drug Court showed that those who successfully completed Drug Court (at a cost to the State of about \$16,000 per year) had recidivism rates about one-third lower than those who served terms of imprisonment (at a cost to the State of about \$100,000 per year). And such research as there is tends to suggest that the longer the term of imprisonment imposed upon an offender, the more likely that offender is to reoffend. So, while there are many good reasons for sending people to prison, it would be contrary to the evidence to place too much weight upon the prospect of imprisonment discouraging reoffending.

### **Justice re-investment**

Cost benefit analyses of imprisonment have been undertaken in many jurisdictions. In the United States, the Council of State Government's Justice Center observed:

"State spending on corrections has risen faster over 20 years than spending on nearly any other State budget item - increasing from 10 billion to 45 billion a year.

Despite mounting expenditures, recidivism rates remain high and by some measures have actually risen. These failure rates are a key reason prison populations continue to swell nationally: the fastest growing category of admissions to prison is of people already under some form of community based supervision (many of whom were recently released from gaol or prison). Any real effort to contain spending on corrections must have as its centrepiece a plan to manage the growth of the prison population."

As the Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, has pointed out in a recent speech to the Australian Institute of Criminology, realisation of the imbalance between the cost and the benefit of imprisonment in other jurisdictions has led to the adoption of "justice re-investment programmes". Those programmes identify communities which have provided a disproportionate component of the prison population, and allocate a proportion of the resources spent on imprisoning members of that community to proactive attempts to reduce imprisonment in that community by improving community facilities and cohesion and the supervision of offenders within those communities.

As the Social Justice Commissioner pointed out, the comparative figures for Australia are that about \$2.6 billion per annum is spent on adult imprisonment, with about \$650,000,000 of that being spent on the imprisonment of indigenous adults. In Western Australia, retired Lieutenant-General John Sanderson has observed that on the basis of the admittedly sketchy figures available, it seems likely that about half of the

money spent on indigenous people by the government of Western Australia is spent in the justice and correction systems. There is much to be said for the proposition that this is shutting the stable door after the horse has bolted. By the time Aboriginal people enter the criminal justice system as a result of multi-faceted disadvantage, it is often too late to effect meaningful changes in behaviour.

### **Levels of reported crime**

It is illustrative to compare what has been happening in our courts and prisons over the last 10 years, with levels of reported crime. Again, at the risk of being parochial, I will use Western Australian data, which seems to be generally consistent with national data. At the broadest level between the year ending 30 June 2002 and the year ending 30 June 2008, total offences reported to police declined from 271,000 to 245,000. There was, however, a change in the character of reported crime over that period, in that the number of offences against the person reported increased from 23,000 to 33,000, whereas the number of property offences reported decreased from 229,000 to 189,000.

At greater levels of specificity, over the 10 years ending 2008, in Western Australia, indexed rates of reported homicides declined by about 40%, armed robbery by 45%, burglary by 45%, motor vehicle theft by 50%, and other theft by 12%. However, over the same period, reported assaults increased by 27%. The indexed rate of reported sexual assaults stayed much the same. These figures are, of course, subject to fluctuations in the rates at which particular types of crime are reported. As the report rates for assault and sexual assault are notoriously lower than the rates of report in the other categories of crime to which I have referred, those are

the categories that are most susceptible to variation as a consequence of fluctuations in report rates.

So, while one would never diminish the seriousness of offences of assault, over the last 10 years there has been a general decrease in the rates of reported offending in Western Australia, and significant decreases in many of the categories of most serious offending, including homicide, armed robbery, burglary and motor vehicle theft. Over the same period, the prison population has increased dramatically. While some of that increase is likely due to increases in the number convicted of assault, and while there have been some changes to the law and to penalties over this period, including perhaps most significantly the introduction of a 6-month minimum prison term, it seems distinctly possible that the greater impact on prison numbers comes from courts sending a greater number of offenders to prison, and for longer.

The most significant change in the laws relating to sentencing in this State in recent decades occurred when the discretion to set a minimum period before parole was replaced by a formula, but that occurred in the mid '90s and provides no explanation for increases over the last 10 years. Nor do increases in maximum penalties appear to be responsible for the increase, as such increases as have occurred have not, of themselves, significantly altered the tariff ranges generally applicable to the ordinary run of those offences. The "three strikes" legislation which results in mandatory imprisonment terms for some offenders appears to have had minimal impact on prison numbers, as those offenders would almost certainly have been imprisoned anyway. The most recent mandatory sentencing legislation has not yet been in operation long enough to have had any impact on prison numbers.

While it seems distinctly possible that the introduction of a 6-month minimum prison term may have increased the length of sentences at the bottom end of the scale, there was no spike in numbers following the introduction of those measures. So the evidence would seem to support the view that leaving aside the recent change in parole practices, the significant increase in prison numbers over that last 10 years in WA is most likely due to an increasingly punitive judiciary, and not to changes in the law, or to significant increases in the severity of offending.

### **Public perceptions**

While it is always difficult to know with any accuracy what the perception of the general public is, the strong impression I get from the correspondence I receive, from public meetings I attend, from talk-back radio, bloggers and media reports is that there is a general perception in this State that crime in general is increasing and that punishment is decreasing. As we have seen, neither of these things is true. What then is the source of this disconnection between apparent public perception and reality?

### **The nature of news**

As I have previously suggested on a number of occasions, it seems to me that the answer to this question lies in the nature of news. Most people gather the information which they use to derive their opinions from the media. By definition, the media will only report that which is newsworthy. The mundane and unremarkable will not be reported and will never come to the attention of the public. Human nature being what it is, events which reflect well on a person are much less likely to attract the attention of the editor than events which reflect adversely.

These general notions concerning the nature of news are supported by any reader's or viewer's observation that sensational crimes, because they have a component of sex or extreme violence, are much more likely to be reported than conventional crimes. The increasing prevalence of closed circuit television and video cameras within mobile phones provides the media with many more opportunities to broadcast gripping vision of criminal conduct than ever before. Naturally enough, when viewers are subjected to a significant increase in the videographic depiction of crime, they are likely to think that it represents an increase in crime, whereas in fact it may only represent an increase in media access to videographic material.

A case in which a victim of crime, or the family of a deceased victim of crime emerges from court to express outrage at the lenience of the sentence imposed is more likely to be reported, especially if there are sound and vision bites for the media to use (such as the interview of the outraged victim or family member), than cases which lack these characteristics. It is highly unlikely that you will read in the newspaper an article to the effect that a judge or magistrate took account of all relevant factors and imposed an eminently reasonable sentence. Nor are the protestations of an offender or his or her family to the effect that the sentence was harsh likely to attract public attention because, after all, "He had it coming".

So, the nature of news distorts the public perception of what is actually happening in our community, and of the response of our courts to criminal conduct. There is nothing new about this. The criminological materials published in previous decades have drawn attention to the tendency of media reporting to suggest that crime is rising when it is

falling, that sentences are soft when they are becoming increasingly harsh, and that prisons are easy when they are desperately overcrowded and grim. Research has also suggested that the disproportionate representation of certain kinds of exceptional crime leads readers and viewers to believe that their own risk of victimisation is far higher than it actually is.

I hasten to emphasise that I do not criticise the media by these observations. The media naturally respond to the interests of their audience. And the media can have a beneficial impact on outcomes in the criminal justice area. Media attention upon a number of wrongful convictions in this State created political pressure for referrals to appellate courts which overturned those convictions. A more recent example of beneficial media intervention occurred just last week, when the media drew attention to the fact that a 12-year-old Aboriginal boy in Northam had been charged and presented to court on charges of receiving a Freddo Frog and a sign with a combined value of less than \$6. After extensive publication of the story, the charges were withdrawn and the boy was referred to a juvenile justice team.

### **Measuring public perception**

There is also a grave danger that the liberal access which modern media provide to individuals to express their particular points of views leads to a perception of public opinion which does not match the fact. Talk-back radio provides an audience to those who are enthusiastic about expressing their view. The same applies to telephone and internet polls in which responses are invited from the general public and public blog sites provided on the internet. Letters to the editor published in newspapers

are written by those who have a burning interest in seeing their view publicised.

There is a real danger in this environment that both judges and politicians will take the views of the vocal minority as representative of the views of the majority, in the same way as viewers and readers will take the tiny proportion of cases reported in the media as representative of the whole. Perhaps some indication of this phenomenon is provided by the many studies which have placed members of the public in the same position as a sentencing judge, provided them with all the facts and circumstances of a particular case, instructions as to the law, and then invited them to impose a sentence. Those studies have repeatedly shown that, generally speaking, the public are more likely to impose a more lenient sentence than the sentence actually imposed by the judge. These studies suggest that members of the public might often give quite different answers to the question "Are sentences generally too lenient?" than to the question "What is the right sentence in this particular case?" The former may be influenced by general perceptions created and reinforced by the vocal minority, whereas the latter will properly be answered by reference to the particular facts and circumstances of the case (like the sentence actually imposed).

### **The effect of apparent public perceptions on politicians**

Modern media also has an impact on the nature of political discourse. The nature of modern media drives politicians who wish to be successful to package their ideas in catchy sound bites rather than to engage in reasoned and measured public discussion. In a 10 or 20 second sound bite, it is impossible to rise to Richard Nixon's challenge and try to make the unpopular popular. It is much easier, in that context, to take the

people where the politician perceives they want to go. And the politician's perception of public opinion, communicated via the media, whether accurate or not, will reinforce the general perception of that opinion.

These various phenomena have combined in recent years to create, in most Australian jurisdictions, what has been called a "law and order auction", in which politicians endeavour to outbid each other on a scale of sentencing severity. This can lead to a form of punitive chicken, in which politicians from opposing parties take increasingly extreme views, daring the other to drop out of the bidding war at the price of electoral failure. Many jurisdictions, including WA, have seen legislation enacted as a consequence of this process, irrespective of which political party happens to be in power from time to time.

### **The impact of apparent public opinion on police practices**

Police, like judges and politicians, all live within our community and are likely to be influenced by their perception of the attitudes of that community. The recent report of the Auditor-General on the juvenile justice system in Western Australia has shown that police practices in relation to court diversionary programmes in the juvenile justice area have changed significantly since diversionary programmes were introduced about 15 years ago. Following their introduction, police utilisation of those programmes was much greater than it is today. The Freddo Frog case I have already mentioned provides a cogent example of that.

### **The impact of public perceptions on the judiciary**

I would not like it to be thought for one moment that my reference to the impact of apparent public perceptions on politicians and the police singles those elements of the criminal justice system out for particular attention. That would be quite unfair and contrary to the propositions which I have suggested earlier in this paper. The data which I have reviewed suggests that it may well be the changing attitudes of the judiciary which has had the greater impact upon an increasingly punitive society. It is probably the judges and magistrates, not the politicians or the police who are sending more people to prison and for longer. This is not to say that the politicians and the police are without influence on the severity of punishment, in the laws which they pass and the policing practices which they adopt, but my analysis would suggest that the greater effect is probably that of changing attitudes within the judiciary.

I do not suggest that judges are consciously influenced in the sentences which they impose by likely public reaction to a particular sentence. I have much greater confidence in the independence and intellectual rigour of the judiciary than that.

This is not to say that judges are immune from personal attack. On the contrary, the pervasive aspect of modern media makes those attacks more direct and personal. Last year one of my judicial colleagues imposed a sentence which provoked a storm of media criticism. A blogger on the internet site provided by one of the media outlets provided the email address of the judge's associate and invited others to express their views on the sentence in forceful terms by an email directed to the associate. Until the blog was taken down, the unfortunate associate received hundreds of hateful and offensive emails. But, despite the vehemence of

the attacks made from time to time on members of the judiciary, I believe that we all discharge our duties as independently as we can, and without regard to personal consequences.

In the context of my earlier remarks on democracy, I remarked upon the American enthusiasm for electing everybody, including judges. In that environment, I think it would be more difficult to be confident of the ability of a judge to deliver a decision uninfluenced by likely public reaction. Indeed, in many States where the judiciary are elected, judges maintain websites upon which their sentencing statistics are posted. The purpose of those websites is to promote the judicial candidate as a tougher sentencer than his or her rivals. This may be part of the reason why the US has the highest imprisonment rate in the world.

So, if judges are not influenced by likely public reaction in individual cases, why are more and more people being sent to prison and for longer? It seems to me to be at least likely that judges are just as influenced as politicians and police by their perception of community standards and expectations. If that is right, the judges must also address Richard Nixon's challenge and lead rather than follow.

This does not mean that judges should wilfully ignore community expectations or standards. What it does mean is that judges have to assume at least part of the responsibility for shaping and encouraging community expectations and standards by better explaining what we do and why. This conclusion supports the proposition which I have developed in more detail in other papers to the effect that it is incumbent upon the judiciary to provide opportunities to the media to provide balanced information to the public about what occurs in our courts. It

also means that our procedures and decisions must be comprehensible to the public and that our decisions must be clearly explained. It is, I think, naïve to suppose that politicians will knowingly adopt policies which are electorally unpopular. The onus is therefore upon the judiciary to do what we can, assisted by the empirical research and analysis undertaken by criminologists, to inform reasoned public debate on these important issues.