There is no single correct sentence

Some thoughts on choice, subjectivity and the ethics of sentencing

Australian Academy of Law

Patron's Address 2023

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12 October 2023

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'There is no single correct sentence.'

All of us will no doubt have heard this expression before. Many of us have used it. Some of us have used it a great deal. Perhaps the less charitable of you might want to suggest, too often. I can personally attest to having used the expression in literally dozens of appeal decisions over the past five years, although, for reasons I hope will emerge, I have never said it when sentencing an offender at first instance.

But what does it mean to say that 'there is no single correct sentence'? And more importantly, how does the meaning that we do attach to that statement affect our approach to the *ethics* of sentencing?

By ethics, in this context, I mean our 'habits of being' and 'habits of interior disposition', two phrases I have taken from a wonderful description of the American writer, Flannery O'Connor, by one of her editors Sally Fitzgerald, who said of O'Connor:[i]

> In the course of living in accordance with her formative beliefs, as she consciously and profoundly wished to do, she acquired, a distinguished habit, which I have called 'the habit of being': an excellence not only of action but of interior disposition that increasingly reflected the object, the being, which specified it, and was itself reflected in what she did and she said.

What then is the 'interior disposition', or ethical starting point for the sentencing exercise? If we are to get to the 'just' result, where do we start? Because in matters ethical, if we don't start from the right place, we are unlikely to arrive at the correct destination, or if we do, it will only have been by accident.

The word that is most clearly associated with the expression 'there is no single correct sentence' is, of course, 'discretion'. So again, to get some feel for the ethics of sentencing, we need to think a little harder about what a discretion is and, more importantly, what it is not.

In attempting to do this, I will not go into the important dividing line between decisions involving 'discretion', on one hand, and value judgements which admit of a 'unique outcome' on the other.[ii] It is, however, noteworthy that, in appeals from decisions of the latter kind, we typically use the expression 'the correctness standard'.[iii] It underlines the fact that appellate review of 'discretionary decisions' are those to which the 'correctness standard does not apply'.

I am not concerned, therefore, with distinguishing 'discretions' from other types of decisions, but rather to how we think about 'discretions' when we come to exercise them. What is our 'interior disposition' and so our ethical starting point?

Before getting to 'discretion' and the origin of our phrase, 'there is no single correct sentence', permit me a little detour into what might seem at first some abstruse philosophy from Plato and his Theory of Ideas.

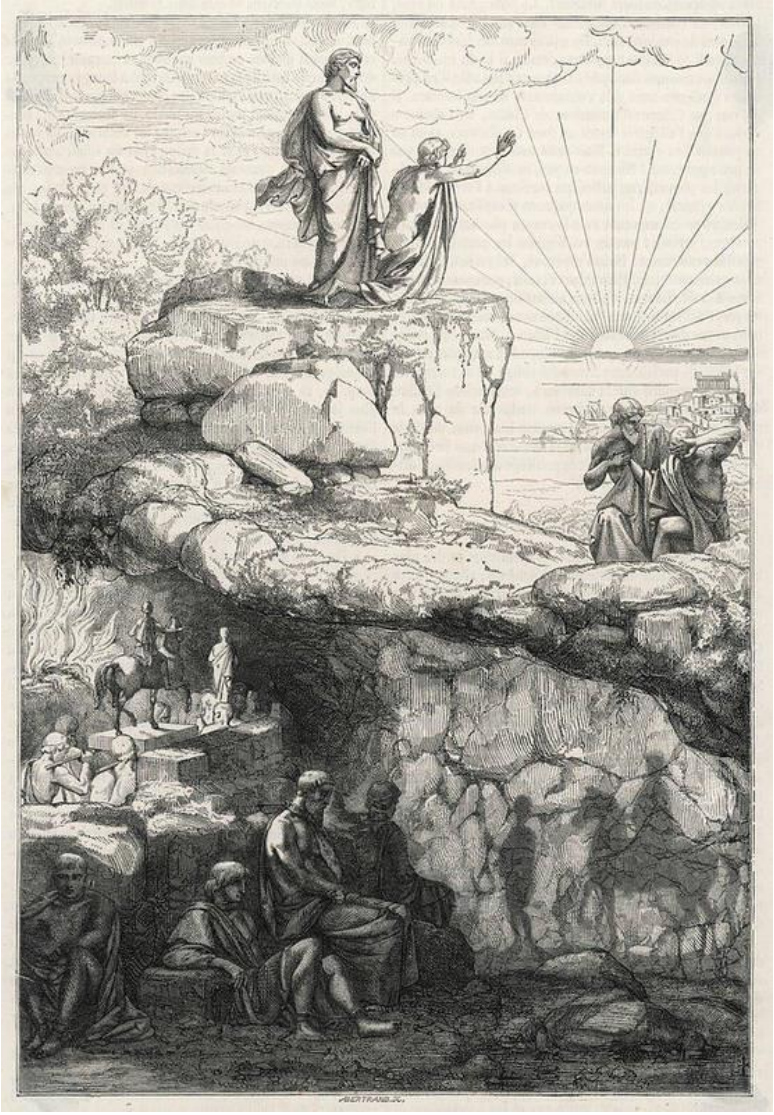
Plato's Theory of Ideas or Theory of Forms (as it is often called today) was his solution to the perennial problem in philosophy: the problem of universals, and how universals (like 'human', 'lectern' or 'justice') relate to particular things in the world (like 'Alan', 'this lectern' or a particular 'just outcome'). And the big question: does a universal, such as 'Red' or 'Justice', actually exist independently of any particular 'red' thing or 'just' thing or are universals merely constructions of our minds?

Plato's solution to the problem of universals was that universals, or what we might call the essences of particular things, actually do exist: they exist as Forms or Ideas. Those Forms or Ideas are not found, however, in the material world but are transcendent. So, for Plato, in addition to all the 'red' things in the world,

none of which are perfectly red, there is, in some transcendent sense, the Idea or Form of the colour 'Red'. For every act of justice in the world, however imperfect, there is the Idea or Form 'Justice'.

These transcendent Forms or Ideas may be beyond our grasp but, for Plato, they are nevertheless *real*. Indeed, platonic Forms or Ideas are the *most* real entities that exist and are in fact more real than anything in our physical world. And that it is, in fact, what we perceive and think of as the real world that is, in truth, the shadow of the Ideals.

Plato famously illustrated this concept, amongst other concepts, with his Allegory of the Cave, taken from Chapter XXV of *The Republic*:



This is the scene, as described by Socrates:

> Imagine that there are people living in a cave deep underground. The cavern has a mouth that opens to the light above, and a passage exists from this all the way down to the people. They have lived here from infancy, with their legs and necks bound in chains. They cannot move. All they can do is stare directly forward, as the chains stop them from turning their heads around. Imagine that far above and behind them blazes a great fire. Between this fire and the captives, a low partition is erected along a path, something like puppeteers use to conceal themselves during their shows.
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> …
>
> Look and you will also see other people carrying objects back and forth along the partition, things of every kind: images of people and animals, carved in stone and wood and other materials.
>
> …
>
> [U]ndoubtedly, such captives would consider the truth to be nothing but the shadows of the carved objects.
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> …
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> Look again, and think about what would happen if they were released from these chains and these misconceptions. Imagine one of them is set free from his shackles and immediately made to stand up and bend his neck around, to take steps, to gaze up toward the fire. … What do you think his reaction would be if someone informed him that everything he had formerly known was illusion and delusion, but that now he was a few steps closer to reality, oriented now toward things that were more authentic, and able to see more truly? And, even further, if one would direct his attention to the artificial figures passing to and fro and ask him what their names are, would this man not be at a loss to do so? Would he, rather, believe that the shadows he formerly knew were more real than the objects now being shown to him?

So this is all of us, mere mortals, sitting in the cave, seeing shadows cast on the wall of the cave, made by the objects carried by the people on the other side. And because that is all that we can see, we take the shadows on the walls to be the real world. What we can't see is the real objects or things themselves.

If we could turn around we might see the objects as they really are and, if we could climb out of the cave, we could see reality as it really is and see the transcendent Ideas or Forms that lie behind all reality.

Of course, for Plato, the people up the top are philosophers, who are able to take themselves out of the cave and appreciate truth as it really is. Let's bracket that for the moment and assume that we, as lawyers and judges, in our ordinary working life can't get up there. But let us also assume that we can at least be conscious that we are limited by what we can see in the cave and that there is an Ideal reality to which the shadows on the wall of the cave are pointing.

Let me return then to our expression, 'There is no single correct sentence'. In order to work out what we mean by this expression, it is worth asking ourselves why we say it. What is the purpose of our saying that there is no single correct sentence for a particular offence and particular offender?

The answer to that question comes down to the nature of the sentencing task itself, which is one of almost infinite complexity. As the High Court put it, in 2001, in ***Wong v The Queen***:[iv]

> The core of the difficulty lies in the complexity of the sentencing task. A sentencing judge must take into account a wide variety of matters which concern the seriousness of the offence for which the offender stands to be sentenced and the personal history and circumstances of the offender. Very often there are competing and contradictory considerations. What may mitigate the seriousness of one offence may aggravate the seriousness of another. Yet from these the sentencing judge must distil an answer which reflects human behaviour in the time or monetary units of punishment.
>
> … [T]he just sentencing of offenders [must reflect] offending behaviour is every bit as diverse as is their personal history and circumstances.

Notice that the diversity described by the Court in this passage is literally limitless.

This is not simply a matter of saying that there are often differences from case to case; rather it is a statement that, by definition and as a matter of principle, no two cases can ever be the same. No two human beings, however similar they may be, are the same. I hesitate to use the expression 'indeterminate', but there is a certain indeterminacy to the exercise, so that one can never know, or be sure, precisely how the different competing and contradictory factors combine in the particular case.

It is no surprise, then, that it was in ***Wong v The Queen*** that a majority of the High Court first described the task of sentencing as an 'instinctive synthesis'. 'Instinctive synthesis' was a phrase first used in the Supreme Court of Victoria, but found majority support in ***Wong v The Queen*** when the Court said:[v]

> [T]here are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say 'may be' quite wrong because the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which … balances many different and conflicting features.

I want to draw attention to two interesting aspects of these passages from ***Wong v The Queen***.

First, notice that in neither passage, does the Court use the word 'discretion'. Of course, that is what the Court is ultimately describing, but it is notable that the task is described without, yet, using 'discretion', which is where I hope to end up.

Secondly, the Court more than once refers to the task as one of arriving at 'a *single* sentence' or 'a *single* result'. At one level that might simply be a reflection of the obvious fact that a sentencing judge only ever imposes one sentence for

each particular offence. But there is, I want to suggest, more to it than that. As a description of the sentencing task, 'instinctive synthesis' captures the need for the judge to arrive at a 'single *correct* result' and a 'single sentence which *correctly* balances many different and conflicting features'.

So what of our expression there is 'no single correct sentence'? What is the genealogy of that phrase?

The expression that there is 'no single correct sentence' appears in a decision of the High Court a few years after ***Wong v The Queen***, in 2005. It was first used in ***Markarian v The Queen*** in which the Court said:[vi]

> The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence.

In this passage we see both the statement that there is no single correct sentence and the description of the judgment as discretionary. Notice also that the passage says 'as the bases for appellate review reveal'. I will return to this in a moment.

Interestingly, while their Honours said that this has 'now been pointed out more than once', in that context their Honours cited only one previous decision of the Court: ***Pearce v The Queen*** , a decision from 1998. In that case McHugh, Hayne & Callinan JJ said:[vii]

> Sentencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision.

This is, I want to suggest, a subtly different statement from the bare statement that there is no single correct sentence. It is rather a description of the *process* of sentencing and the fact that it does not arrive at a single correct answer by a

'process admitting of mathematical precision'.

As far as I can determine, the precise phrase 'there is no single correct sentence' was first used in a number of decisions in the Court of Appeal in Victoria, in the two years preceding ***Markarian v The Queen***. Interestingly the phrase was sometimes rendered with inverted commas, or quotation marks, as in:[viii]

> Sentencing is a paradigm discretionary exercise: mandatory sentences apart, there is no single 'correct' sentence.

The quotation marks give us a hint that 'correct' is being used in this sentence in a particular, nuanced, way.

That nuance might best be explained by the only authority cited by the High Court in ***Pearce v The Queen*** in relation to its statement that '[s]entencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision'.

That case was ***House v The King***, probably the most often cited decision of the High Court of Australia. The passage cited is the celebrated passage in relation to the limits of appellate review of discretionary decisions, namely that:[ix]

> It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. … It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

This is why we see the statement 'there is no single correct sentence' so often in appeal decisions, and almost exclusively in appeal decisions. It is a statement whose utility is important for understanding the appellate function.

In this way, I want to suggest, the statement 'there is no single correct sentence' is not ultimately a statement about the existence of a correct sentence as such, but is, rather, a statement of judicial humility and, more particularly, of appellate judicial humility.

It is a statement which says that, *if* there is a single correct sentence, given the almost infinite complexity of the sentencing task, no individual judge and no individual human being is able to say what that single correct sentence is. I can, of course, by an instinctive synthesis, arrive at a result that is *intended* to be the single correct sentence and it might be that, in a particular case, the sentence I arrive at is, in truth, the single correct sentence; but I can never know. And within the bounds of reasonableness, I can never know whether my judgement as to what is the single correct sentence is right and the judgement of another judge is wrong.

Of course, while I can never know whether my judgement as to the single correct sentence is right, there can be occasions upon which I can know that my judgement is wrong. An appeal court might conclude, for example, that the sentence I have imposed is manifestly excessive or manifestly inadequate. In such a case we may safely say that, *if* there is a single correct sentence, it is not the sentence that I imposed. But, as the High Court's decision in ***Barbaro v The Queen*** (to which I will return) makes clear, that is all we can say. Because, even when the appeal court resentences, it can never know if what it has imposed is the single correct sentence. Which is why, on appeal, we routinely say that there is no single correct sentence.

But, at the risk of heresy, I want to suggest that, at least in an ethical sense, there **is** a single correct sentence.

Or at the very least, sentencing judges, to be true to their oath, must act *as if* there is a single correct sentence in every case and that it is their duty to find it. And, I want to suggest that if that is not our starting point, we run the risk of failing to discharge our ethical duties.

Let me be clear, however, so as to avoid the charge of heresy. The single correct sentence that I am describing is not ultimately accessible by any of us. In this world, it does not exist, as the authorities repeatedly insist. But to return to Plato, it does exist, as an Idea (or a Form). It is the Ideal instinctive synthesis to which all of our individual instinctive syntheses point. It is the Ideal 'just sentence' for the particular case that exists independently of our efforts to find it.

Returning to Plato's cave. We are people seeing the shadows cast on the wall and it is our responsibility to discern, as best we can, the true shape of the picture on the wall, even though we know that we cannot turn around and see the shape exactly as it is. We cannot see the Ideal 'just sentence' that exists just out of our vision, but we know that it is there and it is by improving our focus that we can aim at seeing what is casting the shadow more clearly.

Of course, not all of us are Platonic Realists, and will accept that there is a transcendent 'single correct sentence' that exists in the realm of the Forms. So let me suggest a weaker version of my thesis to explain what I mean. Each time an individual judge embarks on a sentencing exercise there is, for that individual judge, a single correct sentence that he or she is duty bound to find. And that single correct sentence (i.e. the judge's single correct sentence) exists independently of the judge's own will or preference. The judge does not create the sentence. It is, rather, the judge's duty, by the application of principle, to *find* it.

What has this got to do with the ethics of sentencing?

To understand that, it is necessary to say something about the notion of a 'range of sentences' and some misconceptions about what we mean by 'discretion'.

Turning first to the 'range of appropriate sentences'.

Criminal lawyers of a certain age, and even those who have joined the profession more recently, will be familiar with expressions to the effect that a sentence was '*within* range' or, conversely that it was 'outside the *available* range'.

Indeed it was once common to hear these sort of descriptions used to describe the result in a particular case, namely that for a particular sentencing exercise there is an available 'range' of dispositions. For example, in ***AB v The Queen***, Hayne J described the principles in ***House v The King*** in the following terms:[x]

> [I]n the case of manifest excess, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence imposed is too heavy and thus lies outside *the permissible range of dispositions*.

This, as I said, was a commonplace way of describing the nature of a sentencing discretion: 'a permissible range of dispositions'. It is one which, while still occasionally employed, has largely fallen out of favour, particularly following the 2014 decision in ***Barbaro v The Queen***.

Indeed, references to a 'range' in more recent decisions are almost variably not references to a permissible 'range' for the particular offence but to the historical range of sentences actually imposed for offences of its type. That is, those references are not to a hypothetical or theoretical range available in the particular case, but are references to the *actual* range of sentences imposed across previous cases. That is, they are simply statements of historical fact. And in that context, the point is explicitly made that such a 'range' does not establish a range for a

sound exercise of sentencing discretion. So for example, in Western Australia, the most oft-cited authority, ***Kabambi v The State of Western Australia***, says this (and no doubt there are analogues in other jurisdictions):[xi]

> The range of sentences customarily imposed for a crime does not establish the range of a sound exercise of the sentencing discretion. Sentences customarily imposed in comparable cases provide a yardstick or reference point for ensuring broad consistency in sentencing, bearing in mind the scope for significant variations in relevant sentencing factors, and that there is no single correct sentence. What is important is the unifying principles which sentences imposed in comparable cases reveal and reflect.

The principles summarised in ***Kabambi*** make no reference to a 'permissible range of dispositions' applicable to the particular case at all.

This is accords with the principles articulated by the High Court in ***Barbaro v The Queen***, which famously held that the prosecution (and by extension the defence) should not be permitted to make a submission to a sentencing judge about the bounds of an available sentencing range. In doing so, the Court concluded that the very notion of an 'available range' could be apt to mislead. Their Honours said:[xii]

> Reference to an 'available range' of sentences derives from the well-known principles in ***House v The King***. The residuary category of error in discretionary judgment identified in ***House*** is where the result embodied in the court's order 'is unreasonable or plainly unjust' and the appellate court infers 'that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance'. In the field of sentencing appeals, this kind of error is usually referred to as 'manifest excess' or 'manifest inadequacy'. But this kind of error can also be (and often is) described as the sentence imposed falling outside the *range* of sentences which could have been imposed if proper principles had been applied. It is, then, common to speak of a sentence as falling outside the *available* range of sentences.

> The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some 'substantial wrong has in fact occurred' in fixing that sentence. For the reasons which follow, the essentially *negative* proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any *positive* statement of the upper and lower limits within which a sentence could properly have been imposed.
>
> Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an 'available range' of sentences, stating the bounds of an 'available range' of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall.

Notice that the appeal court is neither required *nor permitted* to determine the bounds of the range within which the sentence should fall. This is a crucial point: the appeal court is not *permitted* to determine the bounds of the range within which a sentence should fall.

Significantly the Court returned to this point with a reference to ***Wong v The Queen*** (the 2001 decision where I began this discussion) and identification of the sentencing task as being directed towards a 'single sentence':[xiii]

> Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features.

While recognising that there is no single correct sentence (or as I would put it for present purposes, 'no single correct sentence that we can know'), it is significant, I suggest, that in describing the task of sentencing, the Court in ***Barbaro v The Queen*** described the task of the sentencing court as being to reach a 'single sentence' and described as 'impermissible', any determination of 'the bounds of the range within which the sentence should fall'. This last point was made specifically in relation to the task of the 're-sentencing court' (i.e. the appeal court). Nevertheless it applies with even more force, I want to suggest, to a primary sentencing court.

That is, it forms no part of the sentencing task for a judge to, as it were, posit in his or her own mind a range within which the sentence should fall and then choose a point within that range to arrive at a sentence, based on their own preference as to what the sentence should be. As if a judge could say, as one former judge in this State was reputed to have said, 'the approach I take to sentencing is to identify the permissible range of sentences for the particular case, and then sentence at the top of that range'. So that, for example, that judge might say (to herself) 'the permissible range of sentences in this case is eight to ten years imprisonment, so I will choose to impose ten years'. Or, to take the opposite example, another judge might say 'the permissible range of sentences in this case is eight to ten years imprisonment, so I will choose to impose eight years'.

In either case, the judge has made a fundamental error. It may not be that the error is one that will always manifest as an appealable error (in the sense that the sentence imposed is manifestly excessive or manifestly inadequate). But it is, nevertheless, an *ethical* error and an *ethical* failure because the judge has permitted their own personal preference as to punishment (or deterrence or some other consideration) to intrude into the objective assessment of what constitutes the single sentence that balances the many different and conflicting

considerations according to law.

Equally, but perhaps not as obviously, erroneous is the judge who engages in what might be described as *mean* sentencing. Not *mean* in the sense of 'unkind', but *mean* in the sense of 'average'. Such a judge might be one who says (to themselves) 'the permissible range of sentences in this case is eight to ten years imprisonment, so I will choose to impose nine years', perhaps in an effort to ensure that he or she is not the subject of an appeal. As I said this is not as obviously an ethical failure, as is the case with the judge who *chooses* to be as harsh as they can (get away with), or as lenient as they can (get away with), according to their own personal preference. It is still, however, an ethical failure inasmuch as it lacks the virtue of courage; that is, the courage to give effect to their own conclusion as to what the 'just' sentence actually is.

In fact, in an important sense, the sentencing judge does not, and should not *choose* the sentence at all. 'Choice', in the sense of an expression of preference, is the very opposite of the sentencing task and of the judicial function more generally. For 'choice', at least in this sense, implies subjectivity. And subjectivity is the opposite of adherence to principle and the discharge of the judicial office.

But, one might protest, isn't choice and subjectivity what 'discretion' is all about? Isn't the whole point of conferring a judicial discretion, including sentencing discretion, about giving judges a 'choice' about how to act in given circumstances?

Certainly, many references to 'discretion', including in academic literature and case law, do use 'discretion' as a synonym for 'choice'. Professor Rosemary Pattenden's excellent text *The Judge, Discretion and the Criminal Trial*, after setting out six different usages of the word *discretion*, observed that 'common to all usages of the word discretion is the idea of choice but choice does not always

mean the same thing'.[xiv]

Similarly, in ***Coal & Allied Operations v Australian Industrial Relations Commission*** the High Court invoked the notion of choice in describing discretion (including by reference to Professor Pattenden's work):[xv]

> 'Discretion' is a notion that 'signifies a number of different legal concepts'. In general legal terms, it refers to a decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result. Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made.

In addition to the references to 'choice', a 'pure discretion' has also been described as involving a court deciding upon a course of action 'solely as a matter of subjective determination'.[xvi] Even in the case of what are described as 'guided discretions' it is commonplace to hear sentencing discretions as being at least 'partly' determined by reference to subjective determination.[xvii]

Nevertheless, as Professor Pattenden said, 'choice does not always mean the same thing' and, in the context of sentencing, I want to suggest, there is a real sense in which 'choice' is apt to mislead.

That is, despite their sometimes popular association with the notion of 'discretion', I want to suggest that it is fundamental that we carefully avoid thinking about discretionary judgments, and in particular the sentencing task, as having anything to do with 'choice' or 'subjectivity'.

For this we need to rediscover an alternative meaning of 'discretion' that, I suggest, is more suited to our work as lawyers and judges. For this, as always, it is useful to go back to the word's Latin roots.

Discretion comes from the Latin *discretio*, meaning 'to separate', as in to divide things up into their appropriate places. *Discretio* is in turn a participle of

discerno. Which also means 'to separate' but also, significantly, includes the further root word *cerno* 'to perceive' or 'see'. It is from *discerno* that we get the English word discernment.

Discernment is, of course, the ability to perceive, understand and judge things clearly.

'Discernment' is, I suggest, a much better synonym for 'discretion', particularly in the context of the sentencing discretion. That is because, as I hope will be apparent, it conveys no sense of choice or subjectivity. Rather it is about clearly perceiving and judging what is right or correct.

Put another way: discernment emphasises that the sentencing exercise is not an act of the *will*, but an act of the *intellect*.

This is how I suggest the sentencing discretion must be approached for it to be performed ethically: not as an act of the will but as an act of the intellect.

The relationship between discretion and discernment were recently explored in an article by Dr Lorraine Daston, Visiting Professor of Social Thought and History at the University of Chicago. The article was titled *The virtue of discretion*.[xviii] The fact that Professor Daston took, as her paradigm example of discretion, the Rule of St Benedict is, I must say, a happy coincidence.

Professor Dalston, traced the roots of the word discretion and noted that 'in post-classical Latin, starting in about the 5th or 6th century CE, *discretio* begins to take on the additional meanings of prudence, circumspection and discernment in weighty matters'.

She continued:

> Contrary to popular perception that sees discretion as a grey area, the domain of fuzzy knowledge, discretion as an intellectual tool is in fact a powerful lens that sharpens the focus on cloudy concepts and sorts out

> their ambiguity.
>
> As a practical tool, discretion has two sides, one cognitive and the other executive.

As to the cognitive aspect of discretion, Professor Dalston said this:

> To be able to distinguish between cases that differ from one another in small but crucial details is the essence of the cognitive aspect of discretion, an ability that exceeds mere analytical acuity. Discretion draws additionally upon the wisdom of experience, which teaches which distinctions make a difference in practice, not just in principle.
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> …
>
> [D]iscretion preserves the classificatory scheme implied by rules .. but draws meaningful distinctions within those categories… What makes these distinctions meaningful is a combination of experience, which positions discretion in the neighbourhood of prudence and other forms of practical wisdom, and certain guiding values. In … the case of legal decisions, these may be values of fairness or social justice or mercy. Discretion combines intellectual and moral cognition.

Notice that discretion here is described as an intellectual activity, and a skill that can be developed, rather than an act of choosing or an act of the will. Discretion is about drawing meaningful distinctions (including moral distinctions); not choosing to impose distinctions. As I sought to suggest earlier: it is an act of the intellect rather than an act of the will.

Professor Dalston does, nevertheless, recognise that 'discretion is a matter of the will as well as the mind'. Where the will comes in, however, is not in the *making* of distinctions, but in the *capacity to give effect to those distinctions*. Thus, as she puts it:

> The executive side of discretion … implies the freedom and power to enforce the insights of the cognitive side of discretion.

This is critical.

Returning to my original theme, it is in this 'executive' sense, and only in this sense, that a sentencing discretion can properly be described as involving any choice: that is, 'choice' in the sense of the freedom to give effect to the insights gained by the intellectual cognition involved in objectively applying all relevant legal principles to the facts and circumstances of the particular case. And crucially, the cognitive side of the sentencing discretion must arrive at the result *before* the executive side of the discretion comes into play at all.

Expressed in terms of legal principle, the cognitive side of the sentencing discretion *is* the 'instinctive synthesis' which balances many different and conflicting considerations. The instinctive synthesis is complete *before* the executive side of discretion operates. Indeed, while the instinctive synthesis involves a process, the executive side of discretion happens in a moment. That moment is the moment in which the sentence is pronounced. Prior to that moment, the intellectual and moral cognition involved in the instinctive synthesis continues to be operative.

In this way, a judicial discretion should not be regarded, or approached, as a 'licence to choose' but, rather, a 'freedom to decide' (and, most importantly, to decide correctly).

And in doing this, the sentencing judge must necessarily be aiming for what he or she discerns to be the single correct sentence; not choosing between alternatives based on an unstated preference for one outcome or the other. And, having determined what he or she has discerned to be the 'single correct sentence', it is *that* determination to which the judge *must* give effect. In this sense, there is no 'choice' at all.

And this returns us to the essentially ethical dimension of the task.

The judge has the ethical obligation to arrive at the objectively, albeit Platonic, 'single correct sentence' and a correlative ethical obligation to give effect to that determination. Anything else runs the risk of inserting subjective preference into what is an objective determination. It is a complex determination, no doubt, in which the judge must balance an almost infinite variety of competing and contradictory considerations. But it is one which must, and can only, be determined objectively. Because it is only the *objective* synthesis of the wide variety of competing and contradictory considerations, however difficult that may be, that is consistent with the rule of law.

That is why the expression of personal opinions, personal reactions or, even personal outrage, must be foreign to the ethical discharge of the sentencing discretion. We will all be familiar with occasions upon which a judge expresses his or her reasons for sentence in terms of personal opinions, or categories: 'I regard this conduct as appalling'; 'I am disgusted by what you did', even 'This is the worst offence I have ever seen'. Many of us have done this ourselves. It is a common refrain, because all judges, naturally, have such reactions. And it is tempting to do so because, let us admit, the judge who gives expression to his or her personal outrage will so often be lauded by many in our community, and in our media, as 'authentic' or 'a breath of fresh air'. But as natural as those reactions are, and as tempting as their expression may be, they must be resisted. And they must be resisted because, to cast our decisions in personal terms only serves to undermine the rule of law, and for that reason alone, is unethical.

The rule of law demands that our decisions are not, fundamentally, expressions of our views, however enlightened they may be, but expressions of the law.

And so, every time a sentencing judge injects himself or herself into the sentencing exercise, in such a way that the sentence is identified with the identity

of the judge, the rule of law is undermined. It undermines the rule of law because it feeds into the corrosive notion, so common in our contemporary culture that all evaluative judgments are merely expressions of *subjective* personal preference and that the outcomes of legal proceedings are, in fact, the expression of each individual judge's subjective preferences. Our contemporary culture, *wants* to present all evaluative judgments as *merely* expressions of preference, feeling or attitude and to suggest that all evaluative judgments are radically and essentially *subjective*. And that notion is directly contrary to and in conflict with the rule of law, which presupposes that laws will be interpreted and applied objectively and that certain persons are *able* to apply the law free 'from the vagaries of personal whim or influence'.[xix]

As members of the legal profession and the judiciary, we have a responsibility to maintain and uphold the objectivity upon which the rule of law depends and to create a civic culture that holds fast to the notion that the objective laws that rule us can be, and are, interpreted and applied objectively.

And so when we ourselves feed into the notion that our decisions are the product of our own particular genius, or our own subjective gifts, and are not simply the expression of the legal tradition of which we form but a small part, we undermine the rule of law.

The Legal Realists among you will no doubt protest that this is all an illusion on my part. That there is no transcendent correct sentence and the notion that there should be no 'choice' (in the sense I have described it) in the exercise of a discretion is a comforting fiction. Maybe we are making 'choices' according to our personal preferences all of the time. But that doesn't negate the ethical point I have been trying to make. Because we can at least know that we have fallen into ethical error when we *consciously* move from what we have diligently and faithfully determined is the 'correct' sentence in favour of a sentence which accords with our own preferences. And to the extent that the influence of our

preferences lie *subconsciously*, being aware of that fact at least enables us to be on guard against those preferences, as best we can, and to more consciously, and more conscientiously, undertake the objective duty required of us. Because, as any judge of moderate experience and moderate introspection will tell you, we all *know* (dare I say, 'instinctively') when our personal preferences are getting the better of us.

Which is not to say, of course, that sentencing is not a human exercise. It is the most 'human' task a judge will ever be called upon to perform. As the court said in ***R v Kane***, 'justice and humanity walk together'.[xx] We cannot perform this task without drawing upon our humanity in all its diversity.

But we also need to remember, as judges and lawyers, that the humanity necessary for the intellectual and moral cognition required for the exercise of a sentencing discretion is not *my* humanity but *our* common humanity. The sentencing exercise is not about me. So too, the *expression* of reasons for sentencing are not an expression of my preferences or my humanity, but a distillation of why 'justice and humanity walking together' have produced this particular, single correct result, which the law itself has produced.

Of course, as I have said above, I can never know whether my judgement as to the single correct sentence is right and the judgement of another judge is wrong. And if I am appealed, the appeal court will confirm that, for all intents and purposes, there is no single correct sentence. But, nevertheless, aiming for that Ideal correct sentence is the only starting point from which I can possibly arrive at an ethical destination.

Thank you for your attention.

[i] O'Connor, The Habit of Being, 1979, Farrar, Straus & Giroux, xvii.
[ii] See ***Kadir v The Queen*** (2020) 267 CLR 109 [9], (Kiefel CJ, Bell, Keane, Nettle & Edelman JJ).
[iii] See the discussion in ***Minister for Immigration and Border Protection v SZVFW*** (2018) 264 CLR 541 [41] - [43] (Gageler J)
[iv] ***Wong v The Queen*** (2001) 207 CLR 584 [77] – [78] (Gaudron, Gummow & Hayne JJ).
[v] ***Wong v The Queen*** (2001) 207 CLR 584 [75] (Gaudron, Gummow & Hayne JJ).
[vi] ***Markarian v The Queen*** (2005) 228 CLR 357 [27] (Gleeson CJ, Gummow, Hayne & Callinan JJ).
[vii] ***Pearce v The Queen*** (1998) 194 CLR 610 [46] (McHugh, Hayne & Callinan JJ).
[viii] See ***DPP v Anderson*** [2005] VSCA 68 [31] (Batt JA).
[ix] ***House v The King*** (1936) 55 CLR 499, 504 - 505 (Dixon, Evatt & McTiernan JJ)
[x] ***AB v The Queen*** (1999) 198 CLR 111 [130] (Hayne J).
[xi] ***Kabambi v The State of Western Australia*** [2019] WASCA 44 [21] (Buss P, Mitchell & Pritchard JJA).
[xii] ***Barbaro v The Queen*** (2014) 253 CLR 58 [26] – [28] (French CJ, Hayne, Kiefel & Bell JJ).
[xiii] ***Barbaro v The Queen*** (2014) 253 CLR 58 [34] (French CJ, Hayne, Kiefel & Bell JJ).
[xiv] *The Judge, Discretion and the Criminal Trial* 1982, Clarendon Press., 6-7. Interestingly, in Professor Pattenden's revised version *Judicial Discretion and Criminal Litigation* (1990, Oxford University Press), moves away, albeit not entirely, from the emphasis on choice. Her working definition of discretion in that revision is 'decisions … which must be based 'upon reason and the law, but for which there is no special governing statute or rule'.
[xv] ***Coal and Allied Operations v Australian Industrial Relations Commission*** (2000) 203 CLR 194 [19] (Gleeson CJ, Gaudron and Hayne JJ).
[xvi] Edelman, 'Judicial discretion in Australia*'* (2000) 19 *Australian Bar Review* 285, 285.
[xvii] Dworkin, 'Law's Ambitions for Itself' (1985) 71 *Virginia Law Review* 173.
[xviii] www.aeon.co/essays/discretion-is-hard-to-live-with-even-harder-to-live-without (accessed 29 May 2023). I am grateful to the Hon Justice Stephen Hall for referring me to this article.
[xix] I discussed this phenomenon at (perhaps too much) length in Quinlan, *The Rule of Law in a Social Media Age* (2023) 93 ALJ 353.
[xx] ***R v Kane*** [1974] VR 759, 766 (Gowans, Nelson & Anderson JJ).