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CHIEF JUSTICE OF NEW SOUTH WALES

FRANCIS FORBES SOCIETY LEGAL HISTORY TUTORIALS

'A HISTORY OF SENTENCING LAW SINCE FRANCIS FORBES, 1823'

WEDNESDAY 22 SEPTEMBER 2021[*]

INTRODUCTION

1 Welcome to this afternoon's tutorial on a history of sentencing law. As we gather for this session physically dispersed, I would like to begin by recognising the various traditional lands on which we meet. Today I am speaking from the Banco Court, which is located on the land of the Gadigal people of the Eora Nation. I acknowledge these traditional custodians and pay my respects to their Elders, past, present and emerging. I also acknowledge with deep regret the role our legal system has had in perpetrating many injustices against Aboriginal and Torres Strait Islander peoples.

2 Sentencing is a value-laden and contentious area of law. At its essence, sentencing dictates how the community deals with individuals who are understood to present a threat to the social fabric.[1] As such, the law of sentencing at any given point in time is inextricably tied to accompanying social and political mores. As Winston Churchill in 1910 observed, '[t]he mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country.'[2] Therefore, a lesson in the history of sentencing law is a lesson in the development of our country's civilisation. Both have changed radically since the time of New South Wales'

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[*]I express my thanks to my Judicial Clerk, Ms Monique Pankhurst, for her assistance in the preparation of this address.

I notify Aboriginal and Torres Strait Islander readers that the following paper contains description of acts of violence against First Nations peoples, and reference to First Nations peoples who have died, and may be distressing.

[1] Mirko Bagaric, 'Preface' in Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Lawbook, 8th ed, 2021) vii.

[2] United Kingdom, *Parliamentary Debates*, House of Commons, 20 July 1910, vol 19, col 1354 (Winston Churchill).

first Chief Justice, Francis Forbes, who was appointed in 1823. While the dominance of the approach to sentencing known as instinctive synthesis has endured over time, the sentencing law of today is a complex and technical process informed by specific tariffs, detailed rules and overarching principles. But how and why did we get here? I hope today's tutorial on a history of sentencing law will provide you with some answers to this question.

3 Given the interests it deals with, sentencing law is arguably the most important area of the law.[3] Yet to an outsider, sentencing law can appear largely unprincipled and incoherent compared to other bodies of law.[4] But in fact, sentencing law requires judges to take into account and give particular weight to specific factors so that, fundamentally, like cases are treated in like manner, and different cases are treated differently.[5] Notwithstanding this, there are areas of sentencing law that continue to be fluid and highly controversial. Looking at history can help us to understand how and why things are as they are. Particularly in an area as charged as sentencing, which former Chief Justice Spigelman described as engaging 'the interest, and sometimes the passion, of the public at large more than anything else judges do',[6] the process is worthwhile.

4 What I seek to do today is to undertake a historical overview of sentencing law in New South Wales since the early 19th century, tracing its development across three particularly challenging contexts. I will be the first to admit that I am no expert in sentencing law. Granted, sentencing is often described as the hardest task confronting a judicial officer.[7] I hope this tutorial provides you with a better understanding of not only how, but why sentencing law in our state has changed

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[3] Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21(597) *Sydney Law Review* 597, 597.

[4] Ibid.

[5] *Wong v The Queen* (2001) 207 CLR 584, 591 [6] (Gleeson CJ); *Hili v The Queen* (2010) 242 CLR 520, 535 [47]-[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[6] Chief Justice JJ Spigelman, 'Foreword' in *Sentencing Bench Book* (Judicial Commission of New South Wales, 2006) i, i.

[7] Chief Justice Marilyn Warren, 'Judges don't spin' (Speech, Melbourne Press Club, 16 April 2010) 3; Chief Justice T Bathurst, 'Keynote Address' (Speech, NSW Legal Aid Criminal Law Conference, Sydney, 1 August 2012) 2-3 quoted in 6; Judicial Commission of New South Wales, *Sentencing* (Report No 139, July 2013) 6; Interview with David Hunt (Kate Lumley, Sydney, 21 August 2007) quoted in Kate Lumley, 'From controversy to credibility: 20 years of the Judicial Commission of New South Wales' (Article, Judicial Commission of New South Wales, 2008) 5. See also *Veen v The Queen* (1979) 143 CLR 458, 494 (Murphy J); *Channon v The Queen* (1978) 33 FLR 433, 458.

so dramatically over time. In this sense, I intend to go beyond tracing the progression of legal rules and principles and look at the normative framework underpinning developments in the law. Sentencing law targets our most coveted and cherished individual interests, such as the right to liberty, property and one's reputation,[8] and over the years has generated fascinating stories of trial and growth, some of which I will share with you today.

5 In this tutorial, I do not intend to traverse all the aspects of sentencing law since 1823, nor will I pick apart every major development to understand precisely how the law today came to be. There is simply not enough time to do so. As I have indicated, my aim is to first give a broad overview of the history of sentencing law since the early 1800s and then turn to consider sentencing law across three contexts of interest that demonstrate significant change in not only the law, but also our collective sentiment; namely, in respect to capital punishment, Aboriginality and mental illness. Evoking themes of morality, equity and mercy, I hope to demonstrate through these contexts, at least in part, how and why sentencing law in New South Wales has changed so radically since its colonial inception.

BROAD HISTORICAL OVERVIEW

6 Sentencing law is a truly peculiar area of law. So anomalous is it that criminologist Nigel Walker in 1969 famously saw fit to describe sentencing law using an equally peculiar metaphor: 'if the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby'.[9] Some 20 years later, it was said that the baby had grown up and produced a substantial number of offspring.[10] Procreant metaphors aside, the theory, policy and practice comprising sentencing law has and will always be subject to significant and often controversial change over time. In other words, there is a lot to unpack here.

7 I turn first to a broad historical overview of sentencing law. With the passage of

[8] Mirko Bagaric, 'Sentencing: The Road to Nowhere' (1999) 21 *Sydney Law Review* 597, 597.

[9] Nigel Walker, *Sentencing in a Rational Society* (Penguin Books, 1969) 15.

[10] Peter Sallmann, 'In Search of the Holy Grail of Sentencing: An Overview of Some Recent Trends and Developments' (1991) *Journal of Judicial Administration* 124, 125.

time, the task of sentencing has evolved from a ritual of prescribing death in most cases,[11] to a complex decision-making exercise allowing choice of both type and quantum of penalty, after weighing up principles often pointing in different directions, all the while navigating what Justice McHugh described as 'judicial air … thick with trends, statistics, appellate guidance and, often enough these days, statutory guidance',[12] so as to arrive at a sentence that may be regarded as appropriate in that particular case.[13] In light of this convoluted process, it makes sense that the current approach to sentencing in Australia starts with the premise that there is no single, correct, objective sentence.[14] What is required is the imposition of an appropriate sentence, bearing in mind that views can reasonably differ as to what might be considered appropriate,[15] provided there has not been legal error.[16] This discretion that the law commits to sentencing judges is fundamental to the administration of our criminal justice system.[17]

8 Instead of jumping straight back in time, let us first develop a better understanding of our current position. As I indicated, sentencing today involves a complex and technical decision-making process, requiring sentencing judges to reach a conclusion based on an instinctive synthesis approach of weighing and balancing all relevant factors, properly taken into account.[18] Broadly, sentencing requires a balancing of theories of punishment, the application of common law and statutory sentencing principles and objectives, and consideration of a multitude of mitigating and aggravating factors and various

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[11] RG Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 2nd ed, 1999) 2.

[12] *Markarian v The Queen* (2005) 228 CLR 357, 388 [76] (McHugh J).

[13] Ibid 378 [51] (McHugh J); *Elias v The Queen* (2013) 248 CLR 483.

[14] *Markarian v The Queen* (n 12); *Freeman v The Queen* [2011] VSCA 214, 1 [6].

[15] *House v The King* (1936) 55 CLR 499; *Hudson v The Queen* (2010) 30 VR 610; *Freeman v The Queen* (n 14). See also *Lowndes v The Queen* (1999) 195 CLR 665, 671-672 [15], where the Court emphasised that an appellate court must not allow an appeal against sentence solely because it would have imposed a different sentence if it had been in the position of the sentencing judge.

[16] *Lowndes v The Queen* (n 15); *House v The King* (n 15).

[17] *Lowndes v The Queen* (n 15). See also *Wong v The Queen* (n 5) 616 [85] (Gaudron, Gummow and Hayne JJ) quoting *R v Ngui* (2001) 1 VR 579, 584 [12] (Winneke P).

[18] *Markarian v The Queen* (n 12) 390 [84] (McHugh J); *Hudson v The Queen* (n 15); *Ryan v The Queen* (2001) 206 CLR 267; *Hili v The Queen* (n 5); *R v Williscroft* [1975] VR 292, 300 (Adams and Crockett JJ).

statutory and curial guidelines.

9 Let us briefly consider the first aspect of theories of punishment and, more recently, sentencing objectives. In order to properly decide how, and how much to punish, it must first be established on what basis punishment is justified and why we are punishing.[19] In modern Australian sentencing, the principal purposes for imposing punishment are both retributivist and utilitarianist.[20] The theory of retribution broadly asserts that offenders who are blameworthy, in that they have committed deliberate wrongdoing, deserve to suffer punishment in proportion to their wrongdoing.[21] In simple terms, this is the eye for an eye theory of punishment. Utilitarianism, on the other hand, is the view that punishment is inherently bad because of the pain it causes the offender, but is ultimately justified because this is outweighed by the benefits stemming from it.[22] These benefits are traditionally understood to come in the form of incapacitation, deterrence, and rehabilitation.[23] Today, statutory sentencing objectives deriving from these theories provide guidance as to the reasons for which a sentence can be imposed.[24] Consideration of the sentencing objectives and theories enables judges to tailor the means, that is, the sentence, to suit some combination of ends.

10 The second aspect to sentencing is the consideration of the principles of sentencing law. The principles of parsimony, totality, consistency and proportionality are each fundamental parts of the sentencing process. These common law principles guide and circumscribe the exercise of the sentencing discretion and operate to the extent they are consistent with applicable sentencing legislation. The High Court of Australia has repeatedly emphasised that the principle of proportionality is the central tenet of sentencing law.[25]

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[19] Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Lawbook, 8th ed, 2021) 18. In the sentencing process, punishment has been described as the 'logical prior inquiry': M Bagaric, 'From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars' (2014) 19 *Michigan Journal of Race and Law* 349, 353.

[20] See generally Bagaric, Alexander and Edney (n 19) 18-21.

[21] J Anderson, 'Reciprocity as a Justification for Retributivism' (1997) *Criminal Justice Ethics* 13. See generally ibid 21.

[22] Bagaric, Alexander and Edney (n 19) 20-21.

[23] Ibid 21.

[24] Ibid 8. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A ('*CSPA*').

[25] *Veen v The Queen* (n 7); *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Hoare v The Queen* (1989)

Proportionality requires courts to impose a sentence on an offender that is of a severity reflective of the objective seriousness of the offence.[26]

11 And so, this brings me to the third broad aspect of sentencing, namely, discretionary and mandatory sentencing considerations. Both are the result of statutory prescription and common law development, although the two sources often overlap. Discretionary considerations range from a court having regard to the assistance of an offender in locating the body of the victim of a murder, or to a pecuniary penalty or forfeiture order.[27] A classic example of a mandatory consideration is a maximum penalty for an offence, or a standard non-parole period. However, these are, of course, only yardsticks to be taken into account.[28] In many, indeed, in most cases, the sentence imposed will not bear any resemblance to the maximum penalty.[29] A particularly important set of considerations take the form of a host of mitigating and aggravating factors that apply when exercising the sentencing discretion in a particular case, including, for example, prior convictions,[30] the resultant harm,[31] circumstances of the victim or age of the offender.[32]

12 A final key aspect is the sentencing calculus, which pertains to the way in which the task of sentencing is to be approached. In Australia, judges are enjoined by our High Court to engage in an instinctive synthesis approach, which involves taking all relevant considerations into account and assigning each factor due weight to then arrive at a single result, as opposed to taking a two-step approach.[33] And so it is that the age-old adage that the task of sentencing is an

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167 CLR 348.

[26] See *R v Scott* [2005] NSWCCA 152, 4 [15]; *R v Geddes* (1936) SR (NSW) 554; *R v Dodd* (1991) 57 A Crim R 349; *CSPA* (n 24).

[27] Bagaric, Alexander and Edney (n 19) 10.

[28] *Muldrock v The Queen* (2011) 244 CLR 120, 132 [27]; *R v Hoar* (1981) 148 CLR 32, 39 (Gibbs CJ, Mason, Aickin and Brennan JJ).

[29] See *R v Kilic* (2016) 259 CLR 256, 266 [20] (Bell, Gageler, Keane, Nettle and Gordon JJ).

[30] *CSPA* s 21A(2)(d).

[31] See, eg, *CSPA* s 21A(2)(g).

[32] See, eg, *CSPA* ss 21A(2)(a), (k), (l).

[33] *Markarian v The Queen* (n 12). See also *Ryan v The Queen* (n 18) 283-284 [49] citing *R v Williscroft* (n 18).

art and not a science remains apt,[34] albeit controversially so.[35] The instinctive synthesis approach has been criticised for rendering sentences opaque and, consequently, unpredictable and potentially inconsistent.[36] Such concern is understandable when we consider the fact that sentencing decisions profoundly shape people's lives. While more broadly, the correct approach remains up for debate, courts must ultimately ensure like cases are treated in like manner.[37]

13 Now that we have a better understanding of our current position, let us establish how it all began. The history of this country was transformed the moment the British decided to colonise Australia to ease the congestion of its own penal system on the motherland.[38] The first penal settlement was established in New South Wales in 1788, with Captain Arthur Phillip appointed as the first Governor and empowered to make orders for the good government of the settlement.[39] Phillip's legislative powers were assumed to be founded on and justified by the prerogatives of the Crown, though there is now reasonable ground for entertaining a doubt as to whether the Crown had authority to delegate such power to the Governor.[40]

14 Meanwhile, and tragically, the infamous legal fiction of *terra nullius* was invoked

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[34] *R v Jurisic* (1998) 45 NSWLR 209, 215, 250 (Spigelman CJ), 249 (Sully J); *R v Astill* (1992) 64 A Crim R 289, 301 (Sully J).

[35] See, eg, *Wong v The Queen* (n 5) 622, [102]-[103] where Kirby J indicated some disenchantment with the instinctive synthesis approach because of its innately impressionistic character. See generally Bagaric, Alexander and Edney (n 19) 40-46.

[36] *Pesa v The Queen* [2012] VSCA 109, 3 [10]. See generally Bagaric, Alexander and Edney (n 19) 42-46. See, eg, Austin Lovegrove, 'An Empirical Study of Sentencing Disparity among Judges in an Australian Criminal Court' (1984) 33(1) *Applied Psychology* 161; T Vinson et al, *Accountability and the Legal System: Drug Cases Terminating in the District Court 1980-1982* (Report, Criminology Research Council, 1986); Samantha Jeffries and Christine Bond, 'Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia's Higher Courts' (2009) 42 *Australian and New Zealand Journal of Criminology* 49. For observations regarding the difficulty in firmly proving inconsistency in sentencing, see Sarah Kransostein and Arie Freiberg, 'Pursuing Consistency in an Individualist Sentencing Framework: If you don't know where you're going, how do you know when you've got there?' (2013) 76 *Law and Contemporary Problems* 265, 272-273.

[37] *Wong v The Queen* (n 5); *Hili v The Queen* (n 5).

[38] Steven Anderson, *A History of Capital Punishment in the Australian Colonies, 1788 to 1900* (Palgrave Macmillan, 2020) 5.

[39] Alex C Castles, *An Australian Legal History* (Law Book, 1982) 34-35.

[40] Ibid 35. See John Thomas Bigge, *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales* (Report, 1823) 10; Jeremy Bentham, 'A Plea for the Constitution' (1803) 4 *The Works of Jeremy Bentham* 249, 255-260; Thomas Webb, *A compendium of the imperial law and statutes in force in the colony of Victoria together with a table of the sections of imperial statutes transcribed into Victorian statutes* (Maxwell, 2nd ed, 1892) 25.

to deprive traditional owners the control of land occupied by their ancestors.[41] The colony, its government and the courts operated on the basic assumption that the entire continent had been acquired by settlement and not by conquest. Justice Burton in 1833 summed up the deeply flawed yet accepted wisdom when he maintained that Aboriginal peoples 'living without certain habitation and without laws were never in the situation of a conquered people, or this colony that of a ceded country'.[42] This rhetoric can also be seen in the informal law which denied Aboriginal peoples the rights and protections afforded to British subjects. As Chief Justice Forbes observed, the owners of sheep and cattle in the area 'regard[ed] the lives of aboriginal inhabitants as of less value than their stock'.[43]

15 This was despite the fact that apparently all judges of the Supreme Court between 1824 and 1836 agreed that Aboriginal people were entitled to the same protection as anybody else, irrespective of whether they were British subjects or not.[44] It seems the problem was that so many others disagreed: white colonists covered up Aboriginal deaths, voted for acquittal when they sat on juries determining the fate of white men who brutalised Aboriginal bodies, and, as I will discuss, on one uncommon occasion where they found four men guilty of the murder of an Aboriginal boy, the Governor delayed the executions of the offenders for so long that, in the end, everyone agreed it was unfair for the hangings to take place.[45]

16 The Governor was a central actor in our state's early system of criminal justice, endowed with almost absolute power to rule over the convict colony. This included the authority to establish courts, emancipate what he considered deserving convicts, award grants of land and proclaim martial law.[46] So long as the laws he created were not repugnant to the laws of England,[47] the Governor

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[41] Anderson (n 38).

[42] *MacDonald v Levy* (1883) 1 Legge 39, 45.

[43] Bruce Kercher, *Outsiders: Tales from the Supreme Court of NSW, 1824–1836* (Australian Scholarly Publishing, 2006) 41, quoting Forbes to Wilmot Horton, 29 June 1825 in Bennett (ed), *Some Papers*, 73-74.

[44] Kercher (n 43) 43.

[45] Ibid.

[46] Castles (n 39) 34-35; Frederick Watson (ed), *Historical Records of Australia* (ser 1, vol 1, 1997) 1-8.

[47] *Australian Courts Act 1828*, 9 Geo 4, c 83, s 20.

could do as he saw fit for the new settlement. This was the case until 1823, when the Charter of Justice was promulgated, creating the Supreme Court of New South Wales and designating Francis Forbes as the colony's first Chief Justice.[48] The Chief Justice was granted what could amount to a power of vetoing laws proposed by the Governor in certain circumstances.[49] No law was to be presented to or passed by the Legislative Council, which consisted of the Governor and various government officials appointed by the Crown,[50] unless it was first brought before the Chief Justice.[51] Action could then be taken with respect to the legislation only if the Chief Justice confirmed that the proposed law was not repugnant to the Laws of England.[52] This provided one important limitation to the Governor's control over the law of the colony.

17 For the first Chief Justice of New South Wales, the aims of punishment were straightforward, being dominated by theories of deterrence and retribution. It was a time where the principle of *lex talionis*, that is, an eye for an eye, a tooth for a tooth, indeed, a life for a life, made perfect sense.[53] The choice of punishments available to judges reflected these theories, amounting in many cases to a decision between transportation to the New World or the next. Despite this, capital punishment was virtually the default sentence for almost all indictable offences in New South Wales.[54] The lucky ones considered deserving of mercy – which sprang from the Crown but in the colony, was generally exercised through the Governor – often had their sentences commuted to transportation offshore to carry out hard labour, and rarely received an absolute pardon.[55] Ironically, however, life in the penal settlements on Norfolk Island and Moreton Bay was so brutal that some offenders considered it better to be sent to Sydney for trial and execution than to tolerate

[48] *New South Wales Act 1823*, 4 Geo 4, c 96.

[49] Castles (n 39) 130.

[50] Castles (n 39) 131-132.

[51] Ibid 130-131.

[52] *New South Wales Act* (n 48) s 29.

[53] Frederick Lee, 'Abolition of Capital Punishment: A Lecture, Delivered in the School of Arts, Sydney, New South Wales, on Thursday, May 26, 1864' (Lecture, School of Arts, 26 May 1864) 5.

[54] G D Woods, *A History of Criminal Law in New South Wales* (Federation Press, 2002) 19-20.

[55] Anderson (n 38) 42.

the settlements any longer.[56] Indeed, offenders frequently attacked or murdered one another to escape.[57]

18 By the mid-1800s, the transportation of convicts to Australia had slowed down as New South Wales tried to move away from its convict origins. Capital punishment was available for a dwindling number of offences and responsible government was granted in the 1850s, making abolition of the death penalty theoretically more possible than ever before.[58] Claims that criminal sentences imposed by courts in New South Wales were too lenient and inconsistent prompted the young government to establish the state's first Law Reform Commission in 1870.[59] Recognising a need for reform in a number of areas, the Commission went on to create a Draft Bill dealing with a substantial number of matters in criminal law, the most significant of which was sentencing and punishment.[60] At long last, a more comprehensive system of sentencing law was introduced with the passing of the *Criminal Law Amendment Act of 1883* (NSW), following years of debate and dissent. It would take almost another 30 years before the passing of the *Criminal Appeal Act 1912* (NSW) to put in place an appellate system to provide a right of review for error and thereby seek consistency in the application of legal principles in sentencing decisions, and another 40-odd years to officially abolish the death penalty.

CAPITAL PUNISHMENT

19 With that, I now turn to consider sentencing law since the early 19th century with respect to capital punishment. Depending on the race of the condemned criminal, Australia simultaneously led and lagged in the context of the British Empire when it came to abolishing the death penalty.[61] Ultimately, capital punishment survived in each of the Australian colonies up to Federation in

[56] Kercher (n 43) 5.

[57] Ibid.

[58] Anderson (n 38) 208.

[59] Woods (n 54) 247.

[60] Ibid 248. See New South Wales Law Reform Commission, *Consolidation of the Criminal Law* (Report, 1871) 5.

[61] Anderson (n 38) xii.

1901, albeit in a more sanitised state.[62] The demise of the death penalty reveals a host of subtle shifts relating not only to the practice of executions, but more broadly with respect to public sentiment and even national image. When all things are considered, a forensic examination of the history of capital punishment in Australia reveals a punishment never settled, but one subject to constant revision and enduring debate.[63]

20 It is estimated that as many as 80 people per year were executed in Australia during the 19th century.[64] In addition to murder and manslaughter, crimes subject to the death penalty included forgery, burglary, sexual assault, sheep stealing and even in one case, 'being illegally at large'.[65] The rule of Governors Darling and Bourke from 1826 to 1836 was a 'heyday of capital punishment in the colony', with the Supreme Court of New South Wales imposing death sentences on 1296 offenders, of whom 363 were executed.[66] In the year of 1830, 'the 50 executions in New South Wales exceeded the 46 executions recorded for the whole of England and Wales in the same year'.[67]

21 While the criminal law of the penal colony deferred to a broad notion of the rule of law, there was a strong sense that the rule of law, and by extension, the carrying out of capital punishment, was ultimately reliant on the consent of the white men who governed.[68] Nowhere was this clearer than the exercise of the prerogative of mercy. Mercy was almost always a factor in decisions concerning the death penalty and is therefore inextricably tied to the history of capital punishment in New South Wales.[69] The prerogative of mercy – carried out through the Governor as the sovereign's representative – was to be central and

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[62] Ibid xii.

[63] Ibid 4.

[64] Ivan Potas and John Walker, 'Capital Punishment' (Trends and Issues in Criminal Justice Paper No 3, Australian Institute of Criminology, February 1987).

[65] Ibid; S K Mukherjee, John Walker and Evelyn Jacobsen, *Crime and Punishment in the Colonies: A Statistical Profile* (History Project, 1986); L A Whitfeld, *Founders of the Law in Australia* (Butterworths, 1971) 5.

[66] Tim Castle, 'Watching them hang: capital punishment and public support in colonial New South Wales, 1826–1836' (2008) 5(2) *History Australia* 1, 43.2.

[67] Ibid.

[68] Woods (n 54) 3.

[69] Ibid 6.

controversial in the early days of this state.[70] Instructions to Governor Darling in 1825 affirmed that the Governor, acting with the advice of the Executive Council, had ultimate responsibility for ordering executions and granting mercy for capital offences, and sole discretion to carry out non-murder or treason executions.[71] The Executive Council consisted of various government officials appointed by the Crown, including the Chief Justice.[72] Altering the sentence by way of the prerogative of mercy did not, by letter of the law, reverse the decision like our modern Court of Criminal Appeal might.[73] More recently, however, legal scholars like Sue Milne and David Plater have noticed that, given the lack of appeal options available to colonial criminals, the Executive Council functioned imperfectly as the nearest thing to a Court of Criminal Appeal.[74]

22 There was, however, less chance for reprieve in New South Wales during this time than in Britain. While the Governor had power to respite capital sentences for offences less than murder, Governor Darling often chose to let offenders hang.[75] In fact, the British government had to remind Governor Darling that hanging was to be confined to only the gravest of crimes, the implication being that he and the Executive Council too often allowed it to take place.[76] And while the judiciary, juries and the general public accumulated the means by which to express their opinion on death sentences, responsibility for the final decision lay purely with the Executive Council.[77] Even after responsible government was granted in 1855, there remained some ambiguities in the decision-making process. For example, one colonial governor was sanctioned for leaving blank (but signed) pardon slips to be used in his absence, while another later complained that local ministers were of little assistance in coming to a

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[70] Ibid 11.

[71] Frederick Watson (ed), *Historical Records of Australia* (ser 1, vol 12, 1997) 124. See Castle (n 66) 43.11, 48.2.

[72] Castles (n 39) 131-132.

[73] Alpheus Todd, *Parliamentary Government in the British Colonies* (Lawbook Exchange, 2nd ed, 2006) 347.

[74] David Plater and Sue Milne, '"The Quality of Mercy Is Not Strained": The Norfolk Island Mutineers and the Exercise of the Death Penalty in Colonial Australia 1824-1860' (2012) *Australian and New Zealand Law and History Society e-Journal* 1, 41.

[75] Kercher (n 43) 6.

[76] Frederick Watson (ed), *Historical Records of Australia* (ser 1, vol 14, 1997) 497-498.

[77] Anderson (n 38) 45-46.

decision.[78] All the while, decisions were made in private, away from the public eye, and reasons for a decision needed only be recorded on occasions where the Governor deviated from the Executive Council's advice.[79]

23 As time passed, mercy appeared to be dispensed more clearly and capital punishment began to lose its penal popularity.[80] After spiking around the highpoint of the convict era in the 1820s and 30s, the number of executions carried out in Australia steadily declined in proportion to a growing population.[81] Eventually, only offenders of the deepest dye were sent to the hangman, until capital punishment was officially abolished in New South Wales in 1985, although the last execution took place in 1939, at which point the spectacle of it all was well and truly dead.[82] During this period, we can see how public sentiment towards the death penalty shifted as debate emerged over what should be regarded as 'appropriate' punishment by the State.[83]

24 A key moment in this trajectory is the demise of the gallows. Throughout the 19th century, the 'lesson' of the gallows was an oft-used phrase in the Australian colonies. It alluded to the idea that communication is fundamental to the practice of punishment.[84] Indeed, executions were embedded with a host of messages, the most obvious being strictly penal in nature. In 1866, Judge Milford of the Supreme Court of New South Wales stated that '[t]he object of capital punishment is to alarm and deter persons predisposed to crime from committing it'.[85] Situated in a public place and always graphic, the gallows were

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[78] Todd (n 73) 351-353.

[79] Ibid 347.

[80] Anderson (n 38) 4. For those sentenced to death in New South Wales between 1788 and 1798, only 28% were extended mercy, compared to a commutation rate of 67.1% from 1890 to 1900: Ken Macnab, Tim Castle, Amanda Kaladelfos, 'NSW Capital Convictions Database', *Frances Forbes Society for Australian Legal History* (Web Page, 13 August 2015) <http://research.forbessociety.org.au/>; Carolyn Strange, 'Discretionary Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1890-1920' in C Strange (ed), *Qualities of Mercy: Justice, Punishment, and Discretion* (UBC Press, 1996) 143. Note that in the period 1788-1798 only fully confirmed executions and commutations from that period were included in the final calculation.

[81] Anderson (n 38) 4.

[82] Ibid 222.

[83] Phillip Smith, *Punishment and Culture* (University of Chicago Press, 2008) 46.

[84] Anderson (n 38) 6.

[85] Royal Commission on Capital Punishment, United Kingdom, *Report of the Capital Punishment Commission: Together with the Minutes of Evidence and Appendix* (Report, 1866) 588.

sure to alarm onlookers. But the intended lesson of deterrence was often subject to a number of unwanted and unforeseen distractions.[86] A botched hanging, an unruly scaffold, the misbehaving offender, a punishment too severe for the crime – all of these circumstances had the potential to derail the example.[87] It is no wonder then, that all of these distractions were gradually removed by the time of Federation in 1901 – the gallows dismantled, hangings hidden away from the public eye in prisons, the list of capital crimes whittled down, and the post of hangman professionalised.[88]

25 It became apparent in the colony that there was an ever-growing sensitivity to the sight of unnecessary pain and suffering in offenders. Middle and upper class colonists were convinced that witnessing the grisly spectacle of hangings only served to demoralise onlookers and acclimatise them to violence.[89] Norms around gender and age were at play here, given the fact that women and children were known to frequent the foot of the public scaffold, apparently in conflict with the idealised role of these groups – that is, as moral guardians of the home and the virtuous next generation.[90] Following the abolition of public executions, colonial sheriffs were put in charge of determining who was authorised to view private hangings.[91] Hiding away the violent spectacle of the death penalty inside a prison yard was a measure that was generally applauded by the legislators of New South Wales in the name of 'decency' and 'humanity'.[92]

26 Less overt, but more telling, was the political motivation to appear 'civilised' to the outside world. In his masterly work of 1990, *Punishment and Modern Society*, Garland wrote that 'designing penal policy' is an exercise in 'defining ourselves and our society in ways which may be quite central to our cultural and political identity'.[93] Interestingly, in the context of the British Empire,

[86] Anderson (n 38) 6.

[87] Ibid.

[88] Ibid.

[89] Ibid 7.

[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, 1990)

Australia was comparatively early to enact this penal reform.[94] It is believed that the desire to move away from a cultural legacy of convictism underpinned the decision to transition to private executions in Australia.[95] Colonists were deeply concerned about their tarnished reputation abroad, and satirists in London had long poked fun at the odium of New South Wales' far-flung penal settlement.[96] Perhaps – so the thought went – by speeding ahead in this area of penal policy, the people of New South Wales could distinguish themselves from the excesses of their state's blood-stained, convict past.[97] Legislative debates related to this decision, particularly between 1853 and 1858, indicate a country-wide airing of grievances about capital punishment as it was then carried out.[98]

27 Of course, this eventually gave way to a fully-fledged abolitionist movement. With it came nuanced perspectives on punishment, including from the early agitators, Alfred Taylor and Frederick Lee, who pointed out that capital punishment failed to address the root causes of crime, and that punishment should aim to reform the character of the individual.[99] Later, John Haynes, an astute politician with a dream of a colony free from the death penalty, implored his fellow legislators to keep up the march of 'civilisation' in New South Wales.[100] While introducing what became one of many failed abolition bills, Haynes took aim at the supposed piety of those in Parliament, stating, 'I cannot understand that men claiming to have, living in themselves, a personage who was the model of life, and whose every word was charity and forgiveness, being the last to give up their attachment to this barbaric practice'.[101]

28 Almost a century later, an abolition bill was at last passed into law and the death

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[94] Anderson (n 38) 8.

[95] Ibid.

[96] Ibid 140. A very early cartoon, for example, imagined the future parliament of Botany Bay in action – the speaker was a convict in irons sitting in a tree listening to a rowdy debate below on different hanging techniques: John Hirst, *Freedom on the Fatal Shore: Australia's First Colony* (Black Inc, 2008) 176.

[97] Anderson (n 38) 140.

[98] Ibid.

[99] Alfred Joseph Taylor, *Capital Punishment: Reasons Why the Death Penalty Should Be Abolished; with Suggestions for an Efficient Substitute* (Davies, 1877) 10, 12; Lee, (n 53) 7, 13, 14.

[100] Anderson (n 38) 8.

[101] New South Wales, *Parliamentary Debates*, Legislative Assembly, 9 June 1896, 667 (John Haynes).

penalty finally removed as a sentencing option in New South Wales.[102] Despite this, capital punishment has by no means faded from our collective conscience. Debate about whether the death penalty should be reintroduced gains fresh life every now and again, usually following a particularly heinous crime or the toppling of a foreign tyrant.[103] Reflecting on the history of its demise in our state, which followed a slow and often unsteady trajectory, the abolition of capital punishment in New South Wales should be seen as a significant political achievement, and one that we must not take for granted.

ABORIGINALITY

29 I will now turn to consider the history of sentencing law in respect to Aboriginality. As I mentioned, our legal system has played a shameful role in perpetrating injustices against Aboriginal and Torres Strait Islander peoples. While I hope to illustrate how sentencing law has developed to better grapple with these injustices, I want to make it clear that First Nations peoples continue to be let down by our criminal justice system. It is widely known that Aboriginal and Torres Strait Islander peoples have long been overrepresented in our criminal justice system and that,[104] while being lower than what it was in the 1990s, the rate of First Nations deaths in custody remains unacceptably high.[105] Beyond these oft-cited facts, however, aspects of our criminal justice system can contribute to and entrench disadvantage in more subtle ways.[106] While we have made significant steps in the right direction, there is much more work we need to do before Aboriginal and Torres Strait Islander peoples stand as true equals before the law.

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[102] Sam Garkawe, 'The Reintroduction of the Death Penalty in Australia? – Political and Legal Considerations' (2002) 24(2) *Criminal Law Journal* 101, 108.

[103] Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34(659) *Sydney Law Review* 659, 660.

[104] See Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report, December 2017) 21-22; Select Committee on the high level of First Nations people in custody and oversight and review of deaths in custody, Parliament of New South Wales, *The high level of First Nations people in custody and oversight and review of deaths in custody* (Report, 15 April 2021) 21-24.

[105] Ibid 105.

[106] See generally Chris Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (2018) 3(1) *Decolonising Criminal Justice: Indigenous Perspectives on Social Harm* 1.

30 From the time of the Supreme Court's inception in New South Wales, its judges insisted that the law was colour-blind. They considered murder the most horrible of offences, and that the law applied whether the victim was of European or Aboriginal descent.[107] Regardless of whether or not they were British subjects, the judiciary maintained that Aboriginal people were entitled to the same protection of the law against frequent attacks by squatters, stockmen, convict workers and farmers on the frontier.[108] And the same applied in reverse: Aboriginal people were subject to the law when they attacked Europeans.[109] While it seems equality before the law was the formal legal position, it was very rarely put into practice, the reality being that Aboriginal people were 'equal in only the most formal and useless sense'.[110]

31 On the ground, frontier communities often covered up killings of Aboriginal people, allowing many offenders to get away with murder. In some cases, the blame for the failure to follow the high principles set down by the judiciary could be placed on colonial officials, there being a stark difference in the practice of the law between cases where a white person was charged with killing an Aboriginal person and those in the reverse, where an Aboriginal person was on trial for killing a white person.[111] The fact of the matter was that judges were in control only of what happened in court, not what happened before or afterwards.[112] They had very little control over ineffective pre-trial investigations and absolutely none over the governors' post-trial decisions whether to impose the death penalty for white murderers of Aboriginal people.[113]

32 When both the victim and the murderer were Europeans, the Supreme Court of New South Wales put into effect the provisions of an old British statute. Under the ironically titled law, *An Act for Better Preventing the Horrid Crime of Murder*,[114] all persons convicted of murder were to be executed on the two days

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[107] Kercher (n 43) 11.

[108] Ibid.

[109] Ibid.

[110] Ibid.

[111] Ibid 11.

[112] Ibid.

[113] Ibid.

[114] (1752) 25 Geo 3, c 37.

after sentence was passed, unless that day were a Sunday. In that case, the execution would happen on the following Monday. It was common practice in New South Wales to hold murder trials on Fridays, so allowing the murderers the weekend to think about eternity before being thrust into it on Monday.[115] While this should also have been the case when white men were convicted of murdering Aboriginal people, it was not. One particularly grave example of this is the story of the murder of an Aboriginal boy in 1826, and the lives spared of those white men who carried out his pointless murder. In this case, we also gain insight into the strained working relationship between Chief Justice Forbes and the notorious Governor Darling.

33 The murderers' names were John Ridgeway, Samuel Chip, Edward Colhurst and Thomas Stanley. All four worked on a station near Port Stephens and shared a hut there. On the fatal afternoon in May 1826, a 12-year-old Aboriginal boy, who the British called Tommy,[116] was asleep in the hut of the property's overseer when Colhurst approached to wake the boy up. Together, the four men lured the boy out of the hut, took him aboard a boat, and drowned him in the river. Ridgeway, Chip and Colhurst were found guilty of the boy's murder at the first trial in September 1826, and the second jury found Stanley guilty at his trial the following February.[117] In sentencing Ridgeway, Chip and Colhurst to death, Chief Justice Forbes noted 'it was proper that, if the natives were to be kept in subjection, and to pay the dear penalty which they sometimes do for some small crime, that they should also be protected from outrage'.[118] He ordered their execution take place on Saturday, 23 September, three days after the trial. Forbes hoped that the example made of the white offenders would show that they could not destroy Aboriginal lives with impunity.[119]

34 It seems odd that notwithstanding the strength of his statements about the importance of equal justice between white people and Aboriginal people, Chief

[115] Kercher (n 43) 12.

[116] Ibid.

[117] Ibid.

[118] Ibid 14. See W Hirst, *Great Escapes by Convicts in Colonial Australia* (Kangaroo Press, 1999).

[119] Kercher (n 43) 14.

Justice Forbes recommended a consideration of mercy.[120] The Executive Council decided that Chip should be hanged, but that the sentences of Ridgeway and Colhurst should be respited until their cases were referred to London for the King's decision on whether they should be executed.[121] The Council minutes show that Chip was to be made an example to others – the first European to be hanged for the murder of an Aboriginal person in Australia.[122] But what was the example? As I indicated, all murderers were hanged very soon after trial unless there were issues of law or fact in doubt. Murderers were usually hanged, not reprieved. But in this case, by contrast, it was seen as unusual to hang Chip.

35 It may then come as no surprise that, in the end, all four murderers were granted mercy and given a one-way ticket to Norfolk Island to carry out hard labour in chains for life.[123] On 8 October 1826, weeks after the day they were scheduled to die, the cases of Ridgeway and Colhurst were forwarded to London for consideration of whether they should receive mercy, which was ultimately granted. Eventually, Chip and Stanley were both reprieved as well. Forbes thought that Governor Darling had acted autocratically over this, deliberately stalling Chip and Stanley's executions.[124] The day before the two men were to travel via boat to Port Stephens for execution, Governor Darling countermanded this, saying that the boat was too crowded to take them on that trip.[125] In a private note in which Forbes recorded many of his objections to what he considered Darling's despotic conduct, he referred to his 'shameful neglect of executing sentences – *Port Stephens case*'.[126] The Executive Council had decided that the offenders should hang, but the application of a double racial standard by the most powerful man of the time allowed these calculating, and likely racially-motivated murderers to live.[127] In fact, even the second most

[120] Ibid.

[121] Ibid 16.

[122] Ibid 16-17.

[123] Ibid 19-21.

[124] Ibid 20.

[125] Ibid.

[126] Watson (n 71) 644-645; correspondence between governor and judges, 1828, *Chief Justice's Letter Book*, State Records of New South Wales, 4/6651, 190ff.

[127] Kercher (n 43) 20.

powerful man of the time, Chief Justice Forbes, ultimately considered the reprieve of Chip and Stanley appropriate.[128]

36 Tommy's father applied his own form of justice. According to Forbes, after finding out that his son had been murdered, Tommy's father killed the first white man he came across, 'according to the rite of his countrymen, which demands blood for blood'.[129] So too did the formal law of England at the time, as did the British subjects of New South Wales in their customary practices on the frontier. While the formal law provided for the execution of murderers, it did so only for the person who had actually committed the crime. But this was not the practice in the bush. Like Tommy's father, some white men on the frontier engaged in revenge killing against any Aboriginal person in their path. But unlike Tommy's father, white men simultaneously enjoyed the protection, retribution and, as we have seen in Tommy's case, often preferential treatment legitimised and delivered through the formal law. Indeed, when Aboriginal people were tried, they were much more likely than not to be convicted, and when they were convicted of murdering white people, they were invariably hanged.[130] Clearly, there was a vast gap between the treatment of the two peoples.

37 Modern sentencing law continues to grapple with this gap. Since 1975, racial discrimination has been prohibited by the Commonwealth *Racial Discrimination Act 1975* (Cth). In line with this, sentencing principles apply equally irrespective of the race or cultural background of an offender. This much was made clear in the 1994 High Court case of *Walker v The State of New South Wales*, wherein Chief Justice Mason emphasised the basic principle that all people should stand equal before the law, stating that '[a] construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle'.[131] Since then, Australian courts have consistently held that Aboriginality is not a mitigating factor in sentencing, most recently in the High Court decision of *Bugmy v The Queen*.[132] In that case, the High Court rejected

[128] Ibid.

[129] Forbes to Horton, 15 May 1827, Mitchell Library, Reel CY 760.

[130] Kercher (n 43).

[131] *Walker v The State of New South Wales* (1994) 182 CLR 45, 49 (Mason CJ).

[132] (2013) 249 CLR 571. See also Australian Law Reform Commission, *Pathway to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 28 March 2018)

the submission that courts should take judicial notice of the systemic background of deprivation of Aboriginal offenders as a particular category, noting it would be antithetical to the principle of individualised justice,[133] which requires courts to impose sentences that are just and appropriate to the circumstances of each particular case.[134]

38 However, as was made clear in *Bugmy v The Queen*, this does not mean that a judge cannot take into account matters related to an Aboriginal offender's background at sentencing.[135] Regrettably, that often includes socio-economic disadvantage, removal from family, health problems and so on. The circumstances where Aboriginality is relevant at sentencing can be categorised into three broad topics: namely, factors pertaining to the background of Aboriginal offenders, factors relevant to the offender's and/or victim's communities, and factors relevant to traditional custom and law.[136] While this provides some opportunity at sentencing to acknowledge and accommodate for challenges faced by Aboriginal offenders, often rooted in their displacement since colonial times, there is a risk of engaging with Aboriginality at sentencing through a deficit discourse.[137] By a deficit discourse, I mean to refer to dialogue associating negative characteristics with Aboriginality.[138] What's more, this approach to sentencing has failed to have any real impact on the overrepresentation of Aboriginal peoples in our prisons.[139]

39 In 2003, cognisant of shortcomings in conventional sentencing, the first Aboriginal 'Circle Sentencing' court was established.[140] Today, Circle

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194-196.

[133] *Bugmy v The Queen* (n 132) 594 [41].

[134] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, April 2006) 155 [5.21].

[135] *Bugmy v The Queen* (n 132) 592 [37].

[136] New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders* (Report No 96, 2000) 43-51.

[137] See Cunneen (n 106) 3-8.

[138] The *Fernando* principles are a prime example where the Aboriginality of the offender is based predominantly on a set of negative characteristics: *R v Fernando* (1992) 76 A Crim R 58.

[139] Cunneen (n 106) 8.

[140] Circle Sentencing was introduced in New South Wales on a trial basis at Nowra in February 2002. The first Circle Sentencing case to be convened outside Nowra was heard on 26 August 2003 in Dubbo, New South Wales: Judicial Commission of New South Wales and New South Wales Aboriginal Justice Advisory Council, *Circle Sentencing in New South Wales: A Review and Evaluation* (Monograph No 22,

Sentencing operates in a total of 12 Local Courts across New South Wales, and aims to provide Aboriginal people better sentencing outcomes, concentrated on achieving restorative justice between offenders and victims, and reducing recidivism in way that empowers First Nations communities. This latter aim is fundamental to Circle Sentencing, the success of which depends on advancing opportunities for self-determination by actively engaging the offender's local Aboriginal community in the sentencing process. Combined with a less formal procedure, offenders more likely to 'sit up and take notice' of the harm caused not only to victims, but to their broader communities.[141] In practice, this typically involves a presiding magistrate working with a group of Aboriginal elders, respected members of the community, victims and the offender's family to share views and determine an appropriate sentence. Collectively, the group is referred to as 'the circle'.

40 While it is still early days, research clearly indicates the potential of Circle Sentencing to lower the incarceration rate of Aboriginal peoples.[142] What's more, it is associated with lower levels of recidivism.[143] One factor that might help to explain this phenomenon is that circle groups assign different, potentially more effective penalties.[144] Circles have a deeper insight into the circumstances of the offender and are therefore better placed to identify more appropriate penalties.[145] Additionally, sentences are able to be highly structured in a way that magistrates in conventional courts simply do not have the time nor the resources to do.[146] Unlike traditional sentencing, where the emphasis is often on the punishment of the offender, community participation in the sentencing process ensures that the social dimensions relating to the offending behaviour are confronted.[147] Importantly, when that sentencing process ends, community determination continues, with community members

October 2003) iv ('*Circle Sentencing in New South Wales*').

[141] Ibid iv.

[142] Steve Yeong and Elizabeth Moore, 'Circle Sentencing, incarceration and recidivism' (2020) (226) *Crime and Justice Bulletin* 1, 15.

[143] Ibid 14-15.

[144] Ibid 13.

[145] Ibid 15.

[146] *Circle Sentencing in New South Wales* (n 140) 10.

[147] Ibid 52.

utilising local Aboriginal services and resources to assist and monitor the offender in carrying out their sentence.[148]

41 While Circle Sentencing amounts to a significant step in the right direction, the model must not be considered as a panacea for Aboriginal justice concerns. Circle Sentencing is essentially peripheral to the workings of the mainstream criminal justice system, with comparatively few Aboriginal offenders actually appearing before Circle courts.[149] As such, the extent to which Circle Sentencing can effectively deal with the problem of Aboriginal incarceration is an open question. Nevertheless, it is undoubtedly a step in the right direction. Moving forward, we must draw from the success story of Circle Sentencing, and reckon with the room for improvement, to more effectively incorporate Aboriginal customs, practice and healing into all aspects of our criminal justice system.

MENTAL ILLNESS

42 I now turn to consider the history of sentencing law in respect to our third and final context of mental illness. It is a curious thing to think that there was once a time when one's mental health was not only not considered in the context of criminal justice, but was a concept that lacked comprehension altogether. This is particularly curious in the circumstances we find ourselves in of late – we have endured this pandemic and its accompanying lockdowns, restrictions, social isolation and stress for far longer than any of us could have imagined. The mental toll accrued over the past year or two are set to pose a significant public health challenge in the years to come, and no doubt, we will see the consequences through our criminal justice system. In light of this, I consider it worthwhile to reflect on how our criminal justice system has developed over time to accord with growth in mental health literacy.

43 More recently, there has been an increasing awareness of and focus on an offender's mental state at sentencing, not only with respect to moral culpability,

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[148] Ibid.

[149] Cunneen (n 106) 13-14. See also Chris Cunneen, Parliament of Queensland, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement* (November 2005) 200.

but also broader subjective circumstances.[150] Today, we know that mental illness has the potential to severely impair how we perceive and engage with the world around us. Fortunately, where the state of a person's mental health contributes to the commission of an offence in a material way, our criminal justice system recognises that certain considerations arise and must be accommodated for in that person's sentencing.[151] Of course, it may mean that the offender's moral culpability is reduced, such that the need to denounce the crime may be reduced with a corresponding reduction in the sentence.[152] But it may also mean that the example is an inappropriate vehicle for general deterrence, resulting in a lesser sentence than would otherwise have been imposed.[153] It may mean that a custodial sentence may weigh more heavily on that person, justifying a shorter length of their prison term or certain conditions under which it is served.[154] Conversely, it may be that because of the offender's mental illness, they pose a greater danger to the community, and the need to protect the community and considerations of specific deterrence may justify an increased sentence.[155]

44 At the time of the colony's inception in New South Wales, the law relating to the mentally ill was to be found in the royal prerogative, in statutes declaratory of it, in the common law writs and in the decisions of the Court of Chancery.[156] The overriding purpose of this law was to deal with the property of the mentally disturbed, regrettably referred to as 'lunatics' or 'idiots'.[157] Astonishingly,

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[150] Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 287, citing *Channon The Queen* (1978) 20 ALR 1, 4-5; *Veen v The Queen (No 2)* (n 25).

[151] *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *Muldrock v The Queen* (2011) 244 CLR 120; *R v Anderson* [1981] VR 155; *R v Israil* [2002] NSWCCA 255; *R v Henry* (1999) 46 NSWLR 346; *Skelton v R* [2015] NSWCCA 320

[152] *DPP (Cth) v De La Rosa* (n 151) 43 [177] (McClellan CJ at CL), citing *R v Henry* (n 151); *Miller v The Queen* [1999] WASCA 66; *R v Jiminez* [1999] NSWCCA 7; *R v Tsiaras* [1996] 1 VR 398; *Lauritsen v The Queen* (2000) 22 WAR 442; *R v Israil* (n 151); *R v Pearson* [2004] NSWCCA 129; *R v Henry* (n 151).

[153] *DPP (Cth) v De La Rosa* (n 151) 43 [177] (McClellan CJ at CL), citing *R v Engert* .(1995) 84 A Crim R 67; *R v Wright* (1997) 93 A Crim R 48; *R v Israil* (n 151); *R v Pearson* (n 152); *R v Henry* (n 151).

[154] *DPP (Cth) v De La Rosa* (n 151) 43 [177] (McClellan CJ at CL), citing *R v Tsiaras* (n 152); *R v Jiminez* (n 152); *R v Israil* (n 151); *R v Henry* (n 151).

[155] *DPP (Cth) v De La Rosa* (n 151) 43 [177] (McClellan CJ at CL), citing *R v Israil* (n 151); *R v Henry* (n 151).

[156] J McClemens and J M Bennett, 'Historical Notes on the Law of Mental Illness in NSW' (1962) 4(1) *Sydney Law Review* 49, 53.

[157] Ibid 49.

income from the estates of lunatics was at an early period a source of royal revenue.[158] Since 1800, law has dealt with the custody and treatment of mentally ill persons, granted, in colonial times, treatment fell by the wayside.[159] When the issue of mental illness finally came within the purview of the criminal justice system, it was only dealt with in respect of whether or not it qualified the offender under a defence of insanity. It would be a long time before mental illness was properly considered at sentencing.

45 The early distinction drawn between the terms 'lunatic' and 'idiot' is notable in that eventually gave way to the modern inquiry of criminal law into whether an individual is mentally impaired, as compared to mentally disturbed or insane. Today, we see this distinction when comparing defences concerning mental illness, such as the full defence of not guilty by reason of mental illness and the partial defence of diminished responsibility, and, of course, in considering the relationship between one's mental illness and their offending at sentencing. The distinction was referred to in *R v Hadfield*[160] which, despite being apparently lost in the criminal law after that date,[161] had an interesting effect on the development of the law in New South Wales with respect to mental illness. It informed s 4 of the *Dangerous Lunatics Act 1843* (NSW),[162] which provided for a finding of insanity at trial, and was carried over into s 65 of the 1898 Act,[163] and later into s 23(3) of the *Mental Health Act 1958* (NSW).[164] The provision provided a full defence of insanity, akin to today's defence of not guilty by reason of mental illness.

46 While defences relating to mental illness are not directly engaged at sentencing, the history of the development of the defence of insanity underpins concepts and principles central to the task of sentencing mentally ill offenders today. One example is the 'right or wrong test' developed in the early to mid-1800s, which may be likened to today's assessment of the impact of mental illness on an

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[158] W S Holdsworth, *A History of English Law: Volume 1* (Sweet & Maxwell, 7th ed, 1956) 474.

[159] McClemens and Bennett (n 156) 50.

[160] (1800) 27 State Tr 1281.

[161] McClemens and Bennett (n 156) 53.

[162] 7 Vic No 14.

[163] Act No 45, 1898.

[164] McClemens and Bennett (n 156) 57.

offender's moral culpability. Despite Chief Justice Forbes having denied the possibility of such a defence some five years earlier,[165] Justice Dowling allowed the first insanity defence in New South Wales in the 1829 case of *R v MacManus*.[166] The accused was plainly schizophrenic, possessing a typical religious delusion that his victim was the devil. Directed to decide whether the accused 'seemed to be capable of judging right from wrong' at the time of the offence, the jury of seven military men returned a verdict that he was of 'unsound mind' at the relevant time.[167] And with that, MacManus was ordered to be confined in the Lunatic Asylum at His Majesty's pleasure.[168]

47 Again, we see this distinguishing between right and wrong in the 1843 case of *R v M'Naghten*.[169] Although an English case, the M'Naghten matter prompted the government of New South Wales to pass the *Dangerous Lunatics Act 1843* (NSW), which established the first proper legal regime for the civilian mentally ill. This Act was important in that it made provision not only for the defence of insanity and for secure disposition on acquittal, but also for those offenders who were apparently mentally unsound before or at trial, or while in prison. In a similar vein, sentencing law today requires judges to inquire not only into the impact of mental illness on moral culpability, but also consider what type and duration of punishment is appropriate to the particular offender's mental state.

48 Daniel M'Naghten, a 30-year-old Scotsman suffering from paranoid schizophrenia, experienced a delusion that he was being persecuted by the English conservative political party, the Tories. On 20 January 1843, mistaking Sir Robert Peel's private secretary, Edward Drummond, for the Prime Minister himself, M'Naghten shot the unfortunate individual. Leading up to his trial, M'Naghten's counsel, Cockburn QC, was confronted with the following difficulty: M'Naghten knew what he was doing – he was shooting a person whom he believed was a high Tory official. Even if he were insane, was this an

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[165] In the 1824 case of *R v Charland*, Chief Justice Forbes said that there was no defence of insanity known to law: *R v Charland* [1824] KR.

[166] [1829] KR.

[167] Woods (n 54) 155.

[168] See the *Australian* (16 October 1829); *Sydney Gazette* (4 September 1830). The availability in New South Wales of the insanity defence was also confirmed in *R v Blake* [1832] KR, where the 'right/wrong' test was also applied.

[169] (1843) 10 Cl & Fin 200.

excuse in law? Various medical witnesses were called by the defence. Friends and family from Glasgow swore to his delusions of persecution. At the trial, doctors Monro and Morison emphasised that he must have been 'deprived of all self-control'.[170] Lord Chief Justice Tindal told the jury the question was whether at the time of the offence, the accused had been 'sensible that it was a violation of the law of God or of man'.[171] The test, he said, was whether M'Naghten was 'capable of distinguishing between right and wrong'.[172] The jury was quick to acquit M'Naghten, after which M'Naghten was removed to a psychiatric hospital.[173]

49 This verdict provoked widespread public concern, accompanied by indignant letters to British newspaper, *The Times*.[174] Queen Victoria even wrote to Prime Minister Peel to complain about the matter.[175] No doubt this controversy came to the attention of the colonial legal authorities in New South Wales. Indeed, as I indicated, the *Dangerous Lunatics Act 1843* was passed in the same year as a response in part to the *M'Naghten* dilemma.[176] At the time, the problem of mental illness in the community in New South Wales was critical.[177] In the courts, mental illness threw up important questions with respect to blameworthiness, morality, and what our criminal justice system should do with offenders who are unable to tell right from wrong.

50 In these trying times there emerged a most peculiar term – that is, 'moral insanity'. On Saturday, 6 January 1844, John Knatchbull killed a female shopkeeper in order to obtain money to finance his wedding, scheduled for the following Monday. It was a hopeless case:[178] the murdered woman was the mother of two small children, the killing was brutal, unprovoked and callous,

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[170] Woods (n 54) 156, quoting *R v M'Naghten* (1843) 10 Cl & Fin 200.

[171] Ibid.

[172] Ibid.

[173] N Walker, *Crime and Insanity in England* (Edinburgh University Press, 1st ed, 1968) 95.

[174] Peter Shea, 'M'Naghten Revisited – Back to the Future? (The Mental Illness Defence – A Psychiatric Perspective' (2001) 12(3) *Current Issues in Criminal Justice* 347, 352.

[175] Ibid.

[176] Woods (n 54) 158.

[177] Ibid 157. See S Garton, *Medicine and Madness: A Social History of Insanity in New South Wales, 1880-1940* (New South Wales University Press, 1988) 19-21.

[178] *R v Knatchbull* (1844) 1 Legge 176.

and Knatchbull was caught red-handed with 17 pounds taken from the murdered Mrs Jamieson's pocket. The public bayed for the rope.[179] His defence counsel, Robert Lowe, knew that the case could not be defended on the objective facts, which were overwhelming. Knatchbull's defence, if there were to be one, would have to be that he was either mentally, morally or legally irresponsible. At the trial, Lowe's sole argument was that Knatchbull was the victim of a hereditary peculiarity which amounted to a kind of insanity. Lowe put to the jury the argument that 'insanity was not necessarily attended by delusion; that there might be a moral insanity, whose seat is on the will, and which urges man to the commission of crime by an irresistible impulse'.[180] Sorely unimpressed, the jury found Knatchbull guilty of murder and the judge sentenced him to hanging.

51 In light of this hopeless case, it may come as a surprise to hear that the concept of moral insanity was to have a place in criminal jurisprudence for well over the next century.[181] The term 'moral insanity' is traceable to the work of German psychiatric pioneer, Kraepelin, and reflects the observation of offenders whose behaviours and mental states have prompted terms in use today, such as 'psychopathy' and 'personality disorder'.[182] While Knatchbull's sorry case of 'moral insanity' was swiftly rejected as an excuse for murder, observers have continued to note occasional instances where an offender exhibits a state of mind free from delusion, but where their behavioural history reveals certain characteristics indicative of impairment, including a complete lack of remorse or feeling, a lack of insight into the likely consequences of their conduct, and excessive impulsiveness.[183] Putting the unfortunate concept of moral insanity aside, these cases highlight the inadequacy of our early criminal justice system to accommodate for instances of mental impairment that, while not rendering the offender insane, contributed to the commission of the offence in some material way. Today, these more subtle but no less devastating impacts of

[179] Woods (n 54) 159.

[180] R L Knight, *Illiberal Liberal: Robert Lowe in New South Wales, 1842-1850* (Melbourne University Press, 1966) 66, 67.

[181] Woods (n 54) 160, 162.

[182] Ibid 161. The term 'moral insanity' had been used by the British physician, J C Prichard: see Colin Roderick, *John Knatchbull: From Quarterback to Gallows* (Angus and Robertson, 1963) 242.

[183] Woods (n 54) 161-162.

mental illness can be properly considered at sentencing.

52 Proper consideration of mental illness depends heavily on the availability and quality of expert evidence brought before the court. In many cases, judges are confronted with the difficulty of sparse psychiatric evidence, consisting of one or two reports containing evidence based only on what the offender has told the expert. And even in cases where there is available to psychiatric experts an array of resources from which to put together a comprehensive picture of the offender's mental illness over time, there is no guarantee of its cogency at sentencing. Of course, the availability of relevant material is essential to the endeavour, but equally important is having the psychiatric material explain the implications of the offender's mental illness in respect to the issues considered at sentencing. This is no easy task: indeed, it has been said that it involves 'much semantic juggling in an endeavour to fit a square psychological peg into an essentially round criminal law hole'.[184]

53 While it took quite some time before mental impairment was considered at sentencing, and realising the challenges of bringing together evidence critical to the task, this early history of how mental illness was interpreted, described and assessed in the context of defences, formed its foundation. The test of distinguishing between right from wrong has since given way to the more nuanced inquiry into whether an offender's mental illness contributed to the commission of the offence in some material way,[185] but at the heart of both inquiries is an assessment of moral culpability. What's more, this history highlights the importance of a 'sensitive discretionary decision' where mental illness is involved.[186] Diagnoses, labels and hard-and-fast rules alone are useless without a thorough understanding of the relationship between a particular offender's experience of mental illness and their actions and cognitions in acting outside of the law. In our current mental health crisis, let this be a reminder that a little understanding can go a long way.

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[184] K Milte, A Bartholomew and F Galbally, 'Abolition of the Crime of Murder and of Mental Condition Defences' (1975) 49 *The Australian Law Journal* 160, 162.

[185] *DPP (Cth) v De La Rosa* (n 151); *Muldrock v The Queen* (n 151); *Skelton v R* (n 151) 41 [141].

[186] *R v Engert* (n 153) 67.

CONCLUSION

54 As I come now to the end of this tutorial, I ask you to consider the question I posed to you at the beginning: how and why did we get here? Why is sentencing the complex and technical, yet fluid and highly controversial process of today? I ask this not to elicit a simple academic answer, but to reflect on our state's history of sentencing law and motivations underpinning its development over the years.

55 Across the most sensitive and challenging of contexts, be it with respect to our position on capital punishment, our consideration of, and engagement with the experiences and practices of First Nations peoples, and developing law consistent with our mental health literacy, our regard to morality, equity and mercy has enabled us to the develop the more considered and varied sentencing law of today. This not to say, however, that the law is exactly where it should be. To the contrary, it is far from it.

56 But let us be reminded that what we are working towards is not some ultimate and rigid product of sentencing law. In fact, when we look back on the history of sentencing in New South Wales, we see the significance of flexibility to the task. With the accumulation of sentencing experience, the law of sentencing in our state has developed to consist of tariffs, detailed rules and refined principles, but a broad sentencing discretion remains. As former Chief Justice of New South Wales Sir Frederick Jordan once said, in sentencing, 'the only golden rule is that there is no golden rule'.[187] Perhaps some of you had hoped this tutorial to be a foil to that sentiment. Nevertheless, I hope this tutorial has provided you with a better understanding of how and why we have the sentencing law we find ourselves with today.

[187] *R v Geddes* (1936) 36 SR (NSW) 554, 555.