Rule of Law Institute of Australia

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Thank you for inviting me.

A judge is often required to have an understanding of the general community's values. It may be relevant when resolving disputes concerning personal and family problems or disputes between contracting parties, disputes relating to allegations of negligence and many other areas of the civil law. It is of constant relevance for judges dealing with crime. When sentencing, judges are required by the law to make a decision that has regard for community values.

But how do judges gain their understanding of community values? The question was less significant 100 years ago when the community was much smaller, more homogenous in its cultural heritage, and most of its values had a Judaeo-Christian foundation. The community today is significantly different. It is far larger and more culturally diverse.

In recent times, surveys have been conducted to measure the community's attitude towards courts and in particular towards sentencing outcomes for offenders. They were mentioned by Chief Justice Bathurst in a recent speech. They are instructive.

The reduced incidence of violent crime and property crime in our community since 2000 is not reflected in public opinion.[1] Nor is the high conviction rate for these crimes being recognised by the community.[2] People *perceive* sentences to be too lenient. Rightly or wrongly, many people believe that inadequate sentences are a major cause of crime, if not the main cause.[3]

People who get their news from talkback radio and the tabloid media are among those who hold the courts in the lowest regard.[4] Many in the legal community as well as some in the general community dismiss the legitimacy of their views.[5] It is likely that those who read the *Sydney Morning Herald*, listen to Richard Glover or watch ABC television will have different responses to these issues than readers of the *Daily Telegraph* and listeners to Alan Jones or Ray Hadley.

Our attitudes to the criminal justice system are also shaped by our personal experiences. I live as many judges do in a more affluent area of Sydney, where crimes of violence and the possibility of me or a member of my family being caught

[1] Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public Confidence in the New South Wales Criminal Justice System' (Crime and Justice Bulletin No 118, New South Wales Sentencing Council, August 2008); Anna Butler and Katherine McFarlane, 'Public Confidence in the NSW Criminal Justice System' (Monograph 2, New South Wales Sentencing Council, May 2009) 3. The problem is not limited to New South Wales. The Victorian Court of Appeal has also noted the "widely held perception within the community that sentences generally imposed are too lienient": *WCB v The Queen* [2010] VSCA 230, [20] (Warren CJ and Redlich JA) ('*WCB*'). On the perception of undue lenience in other jurisdictions, see David Indermaur, 'Public Perceptions of Sentencing in Perth, Western Australia' (1987) 20 *Australian and New Zealand Journal of Criminology* 163, 171; Michael Hough and Julian V Roberts, 'Attitudes to Punishment: Findings from the British Crime Survey' (Research Study No 179, United Kingdom Home Office, 1998) 17; Julian V Roberts et al, 'Public Attitudes to Sentencing in Canada: Exploring Recent Findings' (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 75, 83.

[2] Butler and McFarlane, above n 1, 6.

[3] Jones et al, above n 1, 2; Butler and McFarlane, above n 1, 8–9.

[4] Jones et al, above n 1, 11–2; Butler and McFarlane, above n 1, 4.

[5] See, eg, Nicholas Cowdery QC, 'Whose Sentences: The Judges', The Public's or Alan Jones'?' (2002) 34(2) *Australian Journal of Forensic Sciences* 49, 52–4.

up in gang warfare are not present. I do not mean to say that I am not personally familiar with crime – my partner and I were robbed in our apartment only last year. But we do not live where drive-by shootings have occurred or gang activities put people in fear. It is thought to be safe to walk our streets in the evening and to use public transport at night over the short distance from the city to our home. As a consequence, I ask myself: do I understand the reason for community concerns about crime? In particular, do I understand community concerns about violent crime reflected in the tabloid media and talkback programs that appeal to people who live in suburbs where these serious problems do exist?

People who have some experience with crime, either as victims, friends or family tend to react emotionally to their situation. It could never be acceptable for emotional responses to crime to prevail over rational, evidence-based outcomes. But requiring rationality from victims and those who worry about the effect that crime is having on their neighbourhoods, while ignoring their emotional response, will almost certainly alienate many of them. It may create a divisive perception that the "elite" – be they lawyers, judges, academics or policymakers – think they know better than those for whom crime is not only a statistic but a *reality*. Attempts to remove emotion entirely from the issue risk diminishing the real concerns of ordinary people. Those who are the victims of crime or who fear that they may become victims will inevitably respond emotionally to their circumstances. These issues present real difficulties for the criminal justice system.

They also present difficulties for judges like myself, who are often called upon to sentence serious offenders. The High Court has said that judges ought to "impose

sentences that accord with legitimate community expectations."[6] Legislation in this State provides that one of the purposes of sentencing is "to recognise the harm done to the victim of the crime *and the community*."[7] These directives are simple enough. But many a judge, myself included, has struggled to work out what community expectations are. Inconveniently for us, the community does not have a direct line to the Law Courts Building in Queens Square. Nor does it speak with one voice. Some people clamour for retribution; others, empathy. True, the courts have formulated some principles to guide judges in their sentencing decisions – I will come to those a bit later – but the task is difficult. As former Chief Justice Gleeson pointed out, there is always the risk that a well-meaning judge will gauge community standards by reference to his or her personal values, though there may be no empirical evidence to suggest that the community as a whole shares the judge's views.[8]

The Legal Studies syllabus is designed to teach students about "the interrelationship between law, justice and society and the changing nature of the law."[9] Students must learn about the criminal law in its social and political context. In the valuable work that you as teachers of young people do, questions will arise about the sources that your students should consult to develop this contextual awareness. Broadsheets, journal articles and law reform reports are all legitimate of course. But what of talkback radio and the tabloid media? Whatever one may think of the views they

[6] *Markarian v The Queen* (2006) 228 CLR 357, 389 [82] (McHugh J). The case law in this area frequently refers to sentences that accord with the "moral sense of the community": see, eg, *R v Geddes* (1936) 36 SR(NSW) 554, 555–6 (Jordan CJ) ('*Geddes*'); *R v Williscroft* [1975] VR 292, 301 (Adam and Crockett JJ); *R v Jurisic* (1998) 45 NSWLR 209, 221 (Spigelman CJ) ('*Jurisic*').
[7] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g) (emphasis added).
[8] *Neindorf v Junkovic* (2005) 80 ALJR 341, 345 (Gleeson CJ).
[9] New South Wales Board of Studies, *Legal Studies Stage 6 – Syllabus* (2009) <http://www.boardofstudies.nsw.edu.au/syllabus_hsc/pdf_doc/legal-studies-syllabus-st6.pdf> (accessed 10 February 2012) 7.

bring to the table, these sources are critical to an understanding of how the community is thinking about any issue.

That these media command such a large market share and influence their readers and listeners in matters of sentencing suggests one of two things: either they accurately reflect the opinion many people hold about community expectations with regard to sentencing, or they have an Orwellian capacity to brainwash people who would otherwise be content with the sentences meted out by the courts. I think that the former is more likely. A recent study concluded that talkback radio can quickly detect "significant shifts in public opinion." "What talkback reveals", according to the study, "are the shifting positions of the swinging voter."[10] The tabloid media have democratic legitimacy. We cannot ignore their contributions to the debate on criminal justice outcomes.

But not all opinions are created equal. The courts have drawn a distinction between "informed" or "legitimate" community expectations on the one hand, and, on the other, "uninformed" or "illegitimate" expectations – a reference to talkback radio and the tabloid media. It is sometimes said that only the former should make the courts sit up and take notice.[11] There is nothing objectionable about this on its face. Of course the courts should make informed sentencing decisions that take into account all relevant considerations. And it is true, as studies have consistently shown, that

[10] Graeme Turner, 'Politics, Radio and Journalism in Australia' (2009) 10(4) *Journalism* 411, 423. See also Ian Ward, 'Talkback Radio, Political Communication and Australian Politics' (2002) 29(1) *Australian Journal of Communication* 21, 33–6.

[11] See, eg *R v Brown* [2009] VSCA 23, [31] (Neave and Weinberg JJA); *R v Hall* (1994) 76 A Crim R 454, 475 ("rational community expectations"); *R v Nemer* (2003) 87 SASR 168, 171–2 [13]–[21] (Doyle CJ); *DPP v DJK* [2003] VSCA 109, [18] (Vincent JA) ("reasonably objective member of the community") ('*DJK*'); *Inkson v The Queen* (1996) 6 Tas R 1, 16 (Underwood J) ("informed public opinion"); *Wicks v The Queen* (1989) 3 WAR 372, 382 (Malcolm CJ) ("courts should not *merely* reflect public opinion") (emphasis added).

people who are given information about a specific crime and the circumstances of the offender will usually favour a sentence that is less severe than the one actually imposed by the court.[12] The informed layperson is less punitive than the one who thinks about punishment in the abstract. However, there is a risk that the construct of "informed community values" may be code for something else: the values of a *particular section* of the community. One that is well-educated, well-off, mostly untroubled by crime, or at least violent crime, and generally unrepresentative of the community at large. It could be that "informed community values" is a concept that stifles legitimate differences of opinion on questions of sentencing principle. This is an area of the criminal law where judges are expected to "reflect the wide range of differing views … that exists in the community"[13] and in which "the only golden rule is that there is no golden rule."[14]

Let me give you a glimpse of the discussion taking place among the judges. The Victorian Court of Appeal recently discussed the notion of "informed community values" in a case called *WCB v The Queen* [2010] VSCA 230. WCB had pleaded guilty in the Victorian County Court to one count of sexual penetration of a child under 16 and two counts of committing an indecent act with or in the presence of a child.[15] The sentencing judge told the offender: "The community would expect you to

[12] Michael Hough, 'People Talking about Puishment' (1996) 35 *The Howard Journal* 191; Michael Hough and Julian V Roberts, 'Sentencing Trends in Britain: Public Knowledge and Public Opinion' (1999) 1 *Punishment & Society* 11; Austin Lovegrove, 'Public Opinion, Sentencing and Lenience: An Empirical Study involving Judges Consulting the Community' [2007] *Criminal Law Review* 769; Karen Gelb, 'More Myths and Misconceptions' (Research Paper, Sentencing Advisory Council, Victoria, 2008) 2; Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Trends and Issues in Criminal Justice No 147, Australian Institute of Criminology, February 2011).
[13] *Jurisic* (1998) 45 NSWLR 209, 221 (Spigelman CJ, Wood CJ at CL, B M James and Adams JJ agreeing).
[14] *Geddes* (1936) 36 SR(NSW) 554, 555 (Jordan CJ).
[15] Contrary to sections 45 and 47 of the *Crimes Act 1958* (Vic) respectively.

be imprisoned for a lengthy period."[16] The judge then sentenced WCB to nine years and three months' imprisonment, with a non-parole period of six years and six months.[17] The offender appealed against this sentence. In the Court of Appeal, he cited studies which suggest that the Victorian community overestimates the severity of offending while underestimating the severity of sentences.[18] He also pointed out, again on the basis of studies, that informed laypeople agree with the sentences routinely imposed by the courts.[19] Against this background, WCB argued that the sentencing judge had mistakenly taken into account the expectations of an *uninformed* community.[20]

The Court held that the sentencing judge had not sentenced WCB on the basis of uninformed community expectations.[21] Importantly, however, the Court accepted the premise that community values are objective and hypothetical – much like the "reasonable person" who pervades the law. The informed community is knowledgeable about sentencing principles and clued-up on current sentencing practices.[22] Some people may ask whether this formulation adequately responds to the obligation to reflect community values in the sentence. Knowledge of sentencing principles is unlikely to be found among many people in the community. Are we in reality confining community expectations to the expectations held by those with knowledge of the criminal law?

[16] *WCB* [2010] VSCA 230, [3] (Warren CJ and Redlich JA).
[17] *WCB* [2010] VSCA 230, [34], [37] (Warren CJ and Redlich JA).
[18] Citing Gelb, above n 12.
[19] Citing Lovegrove, above n 12.
[20] *WCB* [2010] VSCA 230, [15] (Warren CJ and Redlich JA).
[21] The appeal against sentence ultimately succeeded on the ground of manifest excess: *WCB* [2010] VSCA 230, [60]–[66] (Warren CJ and Redlich JA).
[22] *WCB* [2010] VSCA 230, [37] (Warren CJ and Redlich JA).

The Chief Justice of the Western Australian Supreme Court has recently discussed these issues in a case called *Scolaro v Shephard [No 2]* [2010] WASC 271. Ms Scolaro was convicted of unlawful wounding,[23] punishable in Western Australia's summary jurisdiction by a maximum penalty of two years' imprisonment and a fine of $24,000.[24] The charge arose from a "glassing attack" at a nightclub late one evening in March 2009. Ms Scolaro struck the victim in the face with a heavy glass from which she had been drinking. The victim was badly disfigured by the attack. There have been in recent years, as the magistrate noted in the *Scolaro* case,[25] a spate of glassings at bars and clubs that have aroused concerns in our community.[26]

The magistrate acknowledged his sentencing discretion, but went on to say that "discretion has to be exercised in accordance with community expectations."[27] The magistrate continued: "one very clear community expectation is that if someone smashes a glass or bottle into another person's face and causes disfiguring injuries, then that person should be dealt with by way of a prison sentence."[28] The magistrate sentenced the offender to 18 months' imprisonment. On appeal to the Supreme Court, Ms Scolaro argued that the magistrate was wrong to think that his discretion was constrained by community expectations. The true position was said to be that those expectations were merely one relevant factor among many.[29] Chief Justice Martin rejected this submission. His Honour said that although the magistrate at

[23] *Criminal Code* (WA) s 301(1).
[24] *Scolaro v Shephard [No 2]* [2010] WASC 271, [121] (Martin CJ) ('*Scolaro*').
[25] *Scolaro* [2010] WASC 271, [122] (Martin CJ).
[26] See, eg, John Kidman, 'Glassing Attacks on the Rise: 8 in 10 Assaults Linked to Licensed Premises', *Sun Herald* (Sydney), 29 June 2008, 11; Larissa Cummings, 'Glassing Campaign Continues', *The Daily Telegraph* (Sydney), 24 March 2009, 2; Amanda O'Brien, 'Glassing Sparks Plastic Cups Call', *The Australian* (Sydney), 28 September 2010, 2; David Humphries, 'Punch-drunk and Looking for Answers', *The Sydney Morning Herald* (Sydney), 3 September 2011, 6.
[27] *Scolaro* [2010] WASC 271, [121] (Martin CJ).
[28] *Scolaro* [2010] WASC 271, [121] (Martin CJ).
[29] *Scolaro* [2010] WASC 271, [127], [145] (Martin CJ).

times gave the impression that he thought himself constrained by community standards, the tenor of his sentencing remarks as a whole revealed this was not the case.[30] The Chief Justice also affirmed that the only relevant community expectations are *informed* expectations.[31]

The focus on a "legitimate" or "informed" community carries with it an assumption that emotional responses to crime have no place in the sentencing process. At times this assumption comes through explicitly. In the High Court decision of *Ryan v The Queen* (2001) 206 CLR 267, Kirby J had this to say about the sentencing of a priest who had sexually abused 12 boys:

> [S]o far as possible, emotions must be put aside. Otherwise the offender, and society, may be left with a belief that judicial emotion and prejudice against the offender, rather than proper factual and legal analysis of the offences, lies behind the sentence that is imposed …[32]

I doubt whether the tabloid writers or many of their readers would accept the premise that the emotional response to a crime is irrelevant in sentencing. Revulsion for the crime and sympathy for the victim may be seen by many to be an inevitable response by the rational person to the offence, and relevant to the appropriate sentence for the offender.

This is not to suggest that "prejudice against the offender" or other arbitrary considerations should motivate the court's decision. It is merely to acknowledge that the value judgment inherent in the sentencing process involves something more than pure "factual and legal analysis of the offences." The High Court has itself

[30] *Scolaro* [2010] WASC 271, [144]–[151] (Martin CJ).
[31] *Scolaro* [2010] WASC 271, [141]–[142] (Martin CJ).
[32] *Ryan v The Queen* (2001) 206 CLR 267, 302–3 [119]–[120], [122] (Kirby J) ('*Ryan*').

recognised that "*sentencing is not a purely logical exercise*."[33] That is plainly true. As the "expressive" theory of punishment has made clear, beneath every legal response to crime is an emotive and moral one.[34] We intuitively understand that a violent crime ought to be visited with punishment because it communicates a message about the value of human life with which we do not agree, and which we have a shared interest in negating.[35]

When discussing these issues, it may be important that judges do not use the idea of "informed community values" as an excuse to entirely ignore the broad spectrum of moral and emotional responses to crime that exists in the community. The emotional response to crime has a part in shaping community expectations. The research shows that it profoundly influences the many consumers of tabloid media. As one academic has noted, "talkback practitioners seek to evoke affective – rather than rational – responses from audience members. Listeners are encouraged to analyse political and social issues in emotive terms."[36]

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[33] *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) (emphasis added).

[34] See, eg, Joel Feinberg, 'The Expressive Function of Punishment' in R A Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press, 1994); Jean Hampton, 'A New Theory of Retribution' in R G Frey and Christopher W Morris (eds), *Liability and Responsibility* (Cambridge University Press, 1991). Expressivists believe that crimes convey social meanings, and that the purpose of the criminal law is to counter those pernicious meanings. Though the term "expressive punishment" is not, so far as I am aware, used in Australian case law, the cases abound with reference to the synonymous concepts of "denunciation", "condemnation" and "symbolic punishment." See, eg, *Jurisic* (1998) 45 NSWLR 209, 221 (Spigelman CJ) ("denunciation of criminal conduct is a relevant factor"); *Ryan* (2001) 206 CLR 267, 302 [118] (Kirby J) ("the sentence represents 'a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law'") quoting *R v M (CA)* [1996] 1 SCR 500, 558 (Lamer CJ); *WCB* [2010] VSCA 230, [35] (Warren CJ and Redlich JA) ("[t]he sentence communicates society's condemnation of the offender's conduct"); *DJK* [2003] VSCA 109 (Vincent JA) (sentencing is "an assertion of [society's] values").

[35] Jean Hampton and Daniel Farnham (ed), *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy* (Cambridge University Press, 2007) 119; Feinberg, above n 34, 77–8.

[36] Liz Gould, 'Talkback Radio: Power and Perception' (Paper delivered at the Macquarie-Newcastle Humanities Postgraduate Symposium, Macquarie University, February 2007) 6. See also Judy McGregor, 'The Rhetoric of Political Talkback Radio in New Zealand: Combustion or Coherence?' (1996) 23(2) *Australian Journal of Communication* 24, 29.

There is a growing body of research that suggests that people have an innate and powerful urge to condemn wrongdoers. This urge is not satisfied by emotionless appeals to reason or empirical arguments about "what works" in the fight against crime.[37] Professor Arie Freiberg has written about this phenomenon. He identified a difference between *effective* and *affective* concepts of criminal justice.[38] Those whose primary concern is effective justice put their faith in criminal justice policies where they have been empirically proven to deter crime and rehabilitate offenders. Their ranks include policymakers, researchers, academics and many members of the legal profession – in other words, the people responsible for reforming and administering the criminal justice system. However, Professor Freiberg suggests that for the vast majority of the population, affective justice matters most. These people are more punitive in their attitudes to sentencing because for them, crime primarily "represents an affront to social and moral values and norms, to the civic order and to the moral cohesion of society."[39] The affective justice group tend to regard the "rationalists" as out of touch with community expectations. In letters to the editor and on the talkback radio, they insist that "common sense" and the experience of victims are more reliable policy guides than the research commissioned by the "elites" from what are perceived to be their ivory towers. The affective justice group has little patience for the advocates of rehabilitation.

[37] See, eg, Arie Freiberg, 'Affective versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3 *Punishment & Society* 265, 268. See also Arie Frieberg and W G Carson, 'The Limits of Evidence-based Policy: Evidence, Emotion and Criminal Justice' (2010) 69 *Australian Journal of Public Administration* 152; Dan M Kahan, 'The Anatomy of Disgust in Criminal Law' (1998) 96 *Michigan Law Review* 1621; Susanne Karstedt, 'Emotions and Criminal Justice' (2002) 6 *Theoretical Criminology* 299.
[38] Freiberg, above n 37, 266.
[39] Freiberg, above n 37, 269 citing Tom R Tyler and Robert J Boeckmann, 'Three Strikes and You are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers' (1997) 31 *Law and Society Review* 237, 240.

The ultimate question is: how should this research inform sentencing practices in the criminal courts? It may be that if sentencing judges are to be faithful to their obligation to express community values when sentencing, we have to identify how the process "take[s] account of the emotions people feel in the face of wrongdoing."[40] This is not to say that the courts should sentence depending upon the intensity of the emotional reaction to the crime. But nor should they be dismissive or disrespectful of these reactions. There is a temptation to float above the fray of popular opinion, to label every expression of public outrage at sentencing a "moral panic" fuelled by an inflammatory fourth estate. It is unlikely that that approach will assist in enhancing public confidence in the administration of justice.

Judges do not always agree with the value judgments offered by talkback radio presenters and the tabloid media. They react adversely when the comment becomes a personal attack on the decision-maker rather than a meaningful discussion of the decision. But can we ignore any section of the media? They all have a right to express a view about the sentencing process and individual decisions. Each view will, consistent with its assessed merit, have a contribution to make to the development of community standards.

An understanding of the criminal law and the sentencing of offenders is essential to the maintenance of the rule of law in our community. As teachers of young people, you have the opportunity to stimulate discussion of these issues. I trust my short remarks may prove useful in your classrooms.

[40] Freiberg and Carson, above n 37, 152.

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