McAulay Oration

21 November 2019, AFP College Barton

The Law and the Age of Enlightenment

Shane Drumgold SC

Greetings

- Chief Justice Helen Murrell
- Former Chief Justice Terrence Higgins
- Justice Michael Elkaim
- Former Justice Richard Refshauge
- Magistrate James Lawton
- AFP Deputy Commissioner Karl Kent OAM
- Distinguished guests and visitors

I would like to acknowledge the Ngunnawal people, the traditional custodians of the land we are meeting on today, who coincidently, for tens of thousands of years had been doing exactly what we are doing here today — coming from different walks and yarning, sharing different experiences.

The Ngunnawal people have had an uninterrupted succession of generations occupying this land, since before the pyramids were built, and I acknowledge the past, present and emerging generations of the Ngunnawal elders and the other indigenous people here today.

I have treated tonight as a bit of an intellectual indulgence, and I would like to do two things.

Firstly, I would like to have a bit of fun by taking some of the philosophical ideas of philosophers such as Immanuel Kant and Jeremy Bentham and apply them to some of our long-standing legal paradigms, as a sort of thought experiment to try to challenge ourselves.

Secondly, and more seriously, I would like to use this discussion as a prism in the examination of what I think will become one of our greatest challenges over the next century, in our increasing reliance on the rather blunt tool of imprisonment as a means of behavioural change.

To start with, imagine going to your local GP with the flu. The doctor taps your head and says, “I see…”. He then pulls out a scalpel and asks you to hold your arm out. “What are you doing?” you ask. “Oh. Your illness is caused by too much blood in your body, and I need to let some blood out,” the doctor responds. Let me assure you, this is a cure we have used since the middle ages.

Looking to the middle ages for guidance on how to conduct the business of today would be unusual in virtually every modern profession, except the law, which sometimes seems to pride itself on it.

In 2015, we celebrated the 800th anniversary of the Magna Carta, as somehow providing validation for our present ideas of the elusive concept of justice. Which is cutting edge compared to the Ancient Roman Latin maxims often cited to cloak propositions with the purported wisdom of age.

In the December 1784 issue of the Berlin Monthly, German philosopher, Immanuel Kant published an essay entitled *"An answer to the question: What is Enlightenment?"*. Kant's essay that started with the words "*Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another"* and should be on the reading list in every law school in the country.

Although writing on religion, his thesis continued a large body of his works on social philosophy, and indeed was part of a larger enlightenment movement with names such as Voltaire, Jean-Jac Rousseau and John Locke, that appears to have transformed human thought everywhere except for the law. The second paragraph of Kant's paper began with, *"Laziness and cowardice are the reasons why such a large proportion of men* (in a male-centric period)*, even when nature has long emancipated them from alien guidance, nevertheless gladly remain immature for life....It is so convenient to be immature!"* (This sentence ended with an exclamation mark in the original text).

What Kant (and others) were really saying was that, rather than applying the intellectual rigour required to internally justify our view on a particular issue, we instead resort to external justification — specifically, by pointing to the length of time the view has been held (known as appeal to tradition), or the number of people that share the particular view (known as appeal to popularity). The inescapable premise suggesting that a large number of people can't be wrong, or views long held must be correct.

This is what English philosopher Jeremy Bentham called the "*fallacy of the wisdom of our ancestors*". History has well shown that large numbers of people are frequently horribly wrong and can hold wrong views for a very long time. Slavery dates back to the birth of civilisation, and as recently as 150 years ago banks accepted slave ownership as loan security, and the sorting of value by race was the accepted norm until as late as the 1970s.

This is probably most clearly demonstrated in Australia by the fact that 67 years after the introduction of our ultimate shield of justice, the Australian Constitution, we needed a referendum to make two significant changes to address the broadly accepted racial views of

its authors. This included an amendment to the race power in section 51(xxvi) to remove the words *"other than the aboriginal race in any state"*, and the removal of section 127 which explicitly directed that when counting the population *"aboriginal natives shall not be counted"*. Even today, over half a century on, we are still debating the abolition of sections 25 and 51(xxxvi) from the Constitution to remove existing Commonwealth powers to make racially discriminatory laws.

In his major work, *Critique of Pure Reason* (1781), Immanuel Kant argued the strong relationship between reason and human experience. The thrust of Kant's work was that, we are born of particular races, at particular times, to particular parents, in particular social settings. We have particular education, we move within and are influenced by particular social forces, and our views of right and wrong, good and bad are not merely incidental to this. The dynamic and outcomes of the Constitutional Conventions of the 1890s bare testament to this.

According to Kant, if people share our view on a particular issue, it is less attributable to the correctness of the view than us simply stumbling across people with common particular attributes to us — in other words, the people we are naturally drawn to both socially and professionally. If our view has been popular for a long period of time, it may be that each generation simply defaulted to the previous generation of similar people for external validation, without ever applying internal reasoning. The whole thing is usually influenced by 'groupthink', the psychological phenomenon that occurs when a group of people with the common desire for harmony and conformity make irrational decisions, because their desire creates a dynamic that searches for consensus without conflict, by suspending meaningful critical reasoning or evaluation of the position advanced.

Although progressive in some regards, with respect to some of its more fundamental pillars, the law arguably suffers worse from a lack of enlightenment than any other profession. At the very heart of the common law system is the practice of validating a proposition by pointing out that it was held by a previous, often historic parliament or court. Often one that occupied its seat of power back when society's values were completely at odds with our current values. Then as some sort of compensatory measure, we add the scaffold of a Latin phrase or medieval peace treaty to further strengthen the position.

The Magna Carta, for example, was signed at a time when the 3.5 million people occupying the British Isles were ruled by one king and 100 barons, who effectively exploited the villeins by holding them in poverty-stricken slavery, to increase the Baron's wealth. Handing out whatever punishment they wanted, whenever they felt like it. When the incompetent King John I lost some decisive battles in France he needed a bigger slice of his barons' pie, and a civil war broke out between the prosperous barons and the enormously wealthy King. As

was customary at the time, a peace treaty was signed (in 1215) between the inept King John I and the 100 barons, where the King agreed to allow the barons to remain the chief exploiter of the enslaved population of the British Isles. This agreement was so morally corrupt that Pope Innocent III annulled the document four months later, and it disappeared into history. It is only when about 400 years later when Sir Edward Coke was fossicking for arguments in support of his proposed Petition of Rights (1628), which itself was no more than a battle for power between the tyrannical King Charles I and the increasingly powerful Parliament, that he dug out the long dead Magna Carta from the history books and romanticised it in support of his own arguments. Today, we cite the Magna Carta as some beacon of justice whereas it was never more than a tool for exploitation.

This common law practice aims for consistency, but mostly only guarantees that the particular proposition outlives any context that gave it meaning; thus, internal logic and reason fall into the shadow of habit.

This has drawn the ire of the judiciary for at least a century. In the 1914 case of *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd*,[1] Lord Justice Buckley began his judgment with;

> *"I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning such as they are, I should say that it is wrong. But I am bound by authority – which, of course, it is my duty to follow – and, following authority, I feel bound to pronounce the judgement which I am about to deliver".*

Whilst legally frustrating, we have seen internationally that blindly following tradition can be extremely dangerous. In the US, the Second Amendment to the US Constitution ('the right of the people to keep and bear arms') was introduced in 1791 (seven years after the American War for Independence ended), to address the fear of re-ignition by British sympathisers in the new and still unstable late 18th century US democracy. Whilst the powerful US gun lobby argue that it remains necessary in the event of a citizen requiring an AK 47 assault rifle to defend himself against the eighth largest military in the world (should the US government turn tyrannical), it really just allows disenfranchised children to continue to shoot up schools with automatic weapons at the highest rate in the developed world.

By the same token, an accused 'right to silence' was introduced in the 17th century to end the practice of the cruel and tyrannical Stuarts under King Charles I, using the Star Chamber to torture political opponents into making manufactured confessions. Today the 'right to silence' appears to be interpreted as an absolute right to totally disengage with the criminal

[1] [1914] 1 KB 320.

justice process, even where logical engagement would be expected and is in one's own interest. I am not saying the 'right to silence' is universally wrong (I believe strongly to the contrary). I am saying that such provisions should be logical and supported by internally validated reasoning, based on contemporary issues facing today's society, rather than some long past medieval dilemma that we hold onto purely because of its age. Just as the US do with the 2nd amendment to their constitution.

To be fair, no doubt assisted by the introduction of a raft of protections, such as strict interview time limits, compulsory interview recordings, and stringent rules regulating police conduct in interviews, there has been some progress. Over 20 years ago the then British Home Secretary, Mr Michael Howard, introduced the *Criminal Justice and Public Order Bill*. In Mr Howard's speech on section 34 of the Bill to the British Parliament, he noted that whilst the provision did not remove the 'right to silence', it watered down its absolute nature, by allowing a court to draw proper inferences from a suspect's refusal to answer police questions, in circumstances which cried out for an innocent explanation if there was one.

In 2013, the NSW Parliament followed suit and introduced section 89A of the *Evidence Act 1995 (NSW)*, which in a nutshell allows adverse conclusions to be drawn if an adult accused, having been advised by their lawyer, chooses not to participate in a police interview, but later seeks to rely on evidence that could have been raised at the time. Notwithstanding the additional protections, it appears that most jurisdictions (including the ACT) remain too scarred by the conduct of King Charles I (leading to his beheading in 1649) to entertain such amendments.

Ironically, much of the resistance to change often cites the UN Human Rights apparatus, which is itself a concept born over 70 years ago as a political remedy, to quench international embarrassment at not doing enough to prevent the mass murder of six million people by a validly elected German government.

Indeed, when the heart of the modern human rights legislation was drafted in 1954 in the form of the International Covenant on Civil and Political Rights ('ICCPR'), purportedly giving 'everyone' rights that is now suggested would be lost if such changes were allowed, after being central to the treaty negotiations, when it was finally presented on 16 December 1966, Australia, the US and UK all declined to sign it. During this time, section 127 of our Constitution still excluded Indigenous people from being counted as actual people. In the US, the year after the ICCPR was written, Rosa Parks was arrested for not moving to the back of a bus to make room for white people. The year after it was presented in the UN, Mildred and Richard Loving were both sentenced to a year in a Virginia prison for violating Virginia's *Racial Integrity Act* by getting married with different coloured skin. So, when the

original authors of the human rights provisions in the ICCPR inserted the word 'everyone' exactly what they meant remains less than clear.

If there is one thing that history has demonstrated, it is that everything ends. From legal systems to empires, when it ceases to be useful it is eventually replaced.

Survival requires honesty, and honesty requires bravery. And if the role of the criminal justice system is to reform behaviour, we need to be brave enough to honestly say that we are not very good at it and getting noticeably worse. Let's look at Australia's imprisonment rates for example.

At the end of penal transportation in the mid-19th century, Australia's imprisonment rate per 100,000 population started to fall from around 700, to where it settled at the start of the 20th century at an equilibrium of just under 100 – where it remained for 80 years.[2]

Then in the 1980s we changed the way we spoke about criminal conduct. As our previous narrative of rehabilitation, and foundation statements such as Winston Churchill's *"the mood and temper of the public in the treatment of criminals is the test of civilisation of a country"* fell into the shadow of the increasing simplistic talk of getting tough on crime. A phenomenon leading Cambridge University criminologist Sir Anthony Bottoms coined Populist Punitiveness. In some jurisdictions the populist punitiveness narrative has seen the growth of mandatory sentencing, but in all jurisdictions, it has generally raised the bar on the publics expectations on sentencing.

As with topics such as the Magna Carta, right to silence or the second amendment to the US Constitution, societies have ceased applying the intellectual rigour required to internally justify our view on the value of punitive measures, and now accept it as the norm. Sadly, increasingly building on it with racial elements such as African Crime Gangs, or religiously motivated crime.

In 1985, Australia's imprisonment rate per 100,000 adults was 96.[3] From that point it has climbed by over 130% to its current rate of 220.[4] To set a historic context, the last time the imprisonment rate was as high as it is today was about 50 years after the end of transportation.[5]

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[2] *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia (andrew.leigh.mp@aph.gov.au), pg. 5.

[3] Ibid, pg. 26.

[4] Ibid. In 2018, around 43,000 Australians were in prison, a rate of 221 for every 100,000 adults. See 4517.0 – Prisoners in Australia, 2018 (https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0).

[5] *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia (andrew.leigh.mp@aph.gov.au), pg. 11.

The social ripples from this are deep and wide. The results of the 5th National Prisoner Health Data Collection ('NPHDC') showed that almost 2 in 5 (38%) prisoners reported they had children in the community who were dependent on them for their basic needs.[6] Further, the 803 prison entrants in NPHDC's data collection had a total of 1,451 children.[7] This means almost two children per prison entrant (1.8%) depended on them for their basic needs.[8]

As not all prisoners were asked to be involved in the data collection, the NHPDC sample may not be strictly representative of the total prison population, and sadly there has not been a more comprehensive study in this area. However by applying the ratio of two children per prisoner to the 43,000 prisoners held in Australian prisons as at 30 June 2018,[9] this would loosely suggest that there are around 83,000 children who have a parent in prison.[10] 83,000 little people suffering the impacts of their parent's job loss, deskilling, significant reductions in income, often loss of accommodation, education, and increasing barriers to themselves entering the job market, and more importantly, increased propensity to themselves being drawn into the criminal justice system.

Our increasing prison population is no mean feat, as, since the mid-1980s, as a litmus test our homicide rate has halved,[11] and the average rate of other crimes has dropped by nearly 40% and this rate continues to decline.[12] It is driven by an irrational fear that negatively impacts the lives of citizens. In May 2002, the then Federal Minister for Justice and Customs referred the *Inquiry into Crime in the community: victims, offenders and fear of crime* to the House of Representatives Standing Committee on Legal and Constitutional Affairs. Its report tabled in August 2004 found there was "*a significant mismatch between the levels of fear of crime and actual levels of crime".* This substantially impacts the sense of safety and corresponding quality of life of all Australians – and our job is not just to keep people safe, but to make them feel safe.

As frequently occurs, the rise in imprisonment rates falls hardest on minorities and the socially disadvantaged. The Indigenous prison population in the early 1990s, at the end of the Royal Commission into Aboriginal Deaths in Custody,[13] was 1,124 per 100,000 adults.[14]

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[6] *The health of Australia's prisoners 2018* by the Australian Institute of Health and Welfare, pg. 14.

[7] Ibid. The numbers in the NPHDC's report represented the sample in the data collection, and not the entire prison population.

[8] *The health of Australia's prisoners 2018* by the Australian Institute of Health and Welfare, pg. 14.

[9] 4517.0 – Prisoners in Australia, 2018 (https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0)

[10] *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia (andrew.leigh.mp@aph.gov.au), pg. 19.

[11] Ibid, pgs. 10, 11.

[12] Ibid, pg. 12.

[13] The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) (1987–1991).

In June 2018, it sat at 2,481 per 100,000 adults and has continued at an increasingly steep trajectory.[15]

Australia's imprisonment rate is also getting worse in an international context. Of our four main peers, being Canada, England/Wales, New Zealand and the US, Australia had the lowest imprisonment rate (per 100,000 adults) between 1973-1990.[16] However, by 2016, Australia's imprisonment rate had risen to third place, above Canada and England/Wales.[17] Today, the imprisonment rate in Australia is second[18]. Although the rate is lower than in the US, the US has seen a decline in imprisonment, particularly for the disadvantaged whereas Australia has witnessed a marked increase.[19]

In 2000, the African-American imprisonment rate per 100,000 adults was 3,628, whereas the Australian Indigenous imprisonment rate was 1,438.[20] However, by 2017, US initiatives saw the African-American imprisonment rate drop by 1,300 per 100,000 adults to 2,304, whilst the Australian Indigenous imprisonment rate increased by almost 1,000 per 100,000 adults to 2,433.[21] It is now official - the Australian Indigenous people are currently the most imprisoned race on earth. So, we are in the US slip stream ready to overtake.

I should be clear that in discussing indigenous imprisonment rates, I am not talking about some far-flung corner of Australia. Here in the ACT, in 2007, our percentage of Indigenous prisoners was 8.4% against a national average of 24.4%.[22] Fast forward 10 years and whilst the national average has had a marginal increase to 27.4%, the ACT's average has more than doubled to 21.2%.[23] Likewise, with prisoners with a known prior term of imprisonment - for the same period the Australian average has remained the same at 56.5%, however the ACT's figure has grown from 57.4%[24] to 75.1%.[25]

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[14] *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia (andrew.leigh.mp@aph.gov.au), pg. 19.
[15] Ibid.
[16] Ibid, pg. 26.
[17] Ibid, pgs. 6, 27.
[18] *UK Prison Population Statistics*, Briefing Paper, Number CBP-04334, 23 July 2019, by Georgina Sturge, (House of Commons, Library), pg. 4.
[19] Bureau of Justice Statistics, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6546.
[20] *The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia*, by Andrew Lee, Parliament of Australia (andrew.leigh.mp@aph.gov.au), pg. 28.
[21] Ibid.
[22] 4517.0 - Prisoners in Australia, 2007, Table 3 Prisoners, selected characteristics by states and territories https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02007?OpenDocument.
[23] 4517.0 - Prisoners in Australia, 2017, Table 14 Prisoners, selected characteristics by states and territories https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4517.02017?OpenDocument.
[24] 4517.0 - Prisoners in Australia, 2007, Table 3 Prisoners, selected characteristics by states and territories (as n. 23 above).
[25] 4517.0 - Prisoners in Australia, 2017, Table 14 Prisoners, selected characteristics by states and territories (as n. 24 above).

If our present legal system is to survive natural selection in the face of growing costs and reducing effectiveness in an environment where technology is opening previously unimaginable possibilities, those involved in the system must start an enlightenment revolution. The day is coming where lawyers just turning up to grand buildings in medieval costumes and repeating the views of the previous dwellers will no longer be enough. Although I personally like them, I am coming to the realisations that this change probably won't come from someone still wearing a wig (a fashion trend that stuck after King Charles II visited the fashionable French Court of Louie XIV in 1663). It will most likely come from the future generations of lawyers running the world when my generation has retired and taken our fixation on history with it. If the legal system is to remain relevant in the decades and centuries to come, our future generations of lawyers must shift their focus from *searching for precedence to tell them* what to think, to *learning* how to think.

For my part, as the ACT's most senior public criminal lawyer, I can and must change my narrative, so the public perception of the criminal justice system can follow. An honest logical narrative alone cannot change things, but a dishonest illogical narrative is a most certain barrier to change.

I thank you for being the first audience of my logical, honest narrative.

Shane Drumgold SC
21 November 2019