LENTEN REFLECTIONS 2003

REFLECTIONS ON CRIME AND PUNISHMENT

by

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An address organised by the St James Institute of Spirituality
St James' Church, King Street, Sydney
(www.stjameschurchsydney.org.au)

...I mete and dole
Unequal laws unto a savage race,
That hoard, and sleep, and feed, and know not me.
Tennyson, *Ulysses*.

"Even those petty incidents that others might not notice I found hard to forget. In Auschwitz. I truly had no reason to complain that I was bored.

If I was deeply affected by some incident, I found it impossible to go back to my home and family. I would mount my horse and ride, until I had chased the terrible picture away. Often, at night, I would walk through the stables and seek relief among my beloved animals.

It would often happen, when at home, that my thoughts suddenly turned to incidents that had occurred during the extermination. I then had to go out. I could no longer bear to be in my homely family circle. When 1 saw my children happily playing, or observed my wife's delight over our youngest, the thought would often come to me: how long will our happiness last? My wife could never understand these gloomy moods of mine, and ascribed them to some annoyance connected with my work.

When at night I stood out there beside the transports or by the gas-chambers or the fires, I was often compelled to think of my wife and children, without, however, allowing myself to connect them closely with all that was happening.

It was the same with the married men who worked in the crematoriums or at the fire pits.

When they saw the women and children going into the gas chambers, their thoughts instinctively turned to their own families.

I was no longer happy in Auschwitz once the mass exterminations had begun.

I had become dissatisfied with myself. To this must be added that I was worried because of anxiety about my principal task, the never-ending work, and the untrustworthiness of my colleagues…

When, on Pohl's suggestion, Auschwitz was divided up, he gave me the choice of being commandant of Sachsenhausen or head of DK [the Inspectorate in charge of concentrations camps throughout Germany]. It was something quite exceptional for Pohl to allow any officer a choice of jobs. He gave me twenty-four hours in which to decide. It was really a kindly gesture in good will, a recompense, as he saw it, for the task I had been given at Auschwitz.

At first I felt unhappy at the prospect of uprooting myself, for I had become deeply involved with Auschwitz as a result of all the difficulties and troubles and the many heavy tasks that had been assigned to me there.

But then I was glad to be free from it all."

Rudolf Hoess, Commandant at Auschwitz from December 1943

Hoess estimated that at least 2,500,000 victims were executed and exterminated at Auschwitz by gassing and burning, and at least another half million succumbed to starvation and disease, making a total dead of about 3,000,000. He was arrested by Allied military police in 1946 and handed over to the Polish authorities, who tried him in 1947. He was sentenced to death, and returned to Auschwitz to be hanged on the one-person gallows outside the entrance to the gas chamber. He related before his execution how he often felt weak-kneed at having to push children into the gas chambers –

> *"I did, however, always feel ashamed of this weakness of mine after I talked to Adolf Eichmann. He explained to me that it was especially the children who have to be killed first, because where was the logic in killing a generation of older people and leaving alive a generation of young people who can be possible avengers of their parents and can constitute a new biological cell for the reemerging of this people."*

If Hoess went to heaven, unforgiven, how would he cope with the light? It has always seemed to me that this is what Hell really means. I do not think that it has anything to do with law. It is all about truth. And the central question, it seems to me, about Lent and about Easter, is not so much how truth and eternal life can coexist but how we could possibly cope with that coexistence.

When Beverly Horsburgh asked if I would be prepared to participate in the Spirituality at St James Pre-Lenten Reflections programme, she told me that it is designed to give people a sense of how a busy person fits or has difficulty fitting a Christian routine in the season of Lent. The context for such reflections is, of course, how we exist in the world as Christians. I thought that I would concentrate on that context, focusing on my work. This reminded me of the sentence with which A A Milne commences *Winnie-the Pooh* –

> *"Here is Edward Bear, coming downstairs, bump, bump, bump, on the back of his head, behind Christopher Robin. It is, as far as he knows, the only way of coming downstairs, but sometimes he feels that there really is another way, if only he could stop bumping for a moment and think of it."*

In many ways, I have practiced law rather like Edward Bear coming down stairs: I was more or less sure that I was going in the right direction but, although I felt that there was a better way, I never quite had enough time to think about. As I look back, I realise that I have lived much of my life in the same way. There is a sense in which we are carried along by forces like gravity along a path that goes back before our time and then, ahead, gives some more, but limited choices – at least at one point or other – with reality bumping us as we go, until at last we come to rest, perhaps where we wish to be or, on the other hand, perhaps not. I have been lucky. My wife and family were prepared, if not always happy, to bump down the stairs with me. My appointment to the Bench in 1998 was something like arriving on a landing. The awful thing was that I missed the bumpy ride and sometimes still do. But the landing has provided a space in which useful work can be done and the ambitions of professional success deflected into constructive paths.

I have been working in the law now since my 18th year, when I left school with my leaving certificate and enrolled in Sydney University to do a part time law degree whilst, at the same time undertaking my apprenticeship as an articled law clerk with a small Sydney firm. After five years of study I was duly awarded my degree and launched on what I thought would be a lucrative career of tax and commercial law. However, I decided after a year to go to Papua New Guinea to work in the Crown Solicitor's office in Port Moresby on contract for a couple of years, because I was getting a bit bored and a friend said that it was a great place to see. I went to work on tax after a couple of months before I was transferred – without any request from me – to the Public Solicitor's Office, to do criminal work. I was just 23 years of age. I had never been in a courtroom where a criminal case was being fought before. I was assigned to defend a case of murder.

Many years later, after I became a Queen's Counsel, I lectured to young barristers who are obliged to attend a series of lectures about practicing as advocates in the courts before they are actually let loose on the unsuspecting clients. I told them that there were four important rules that they should understand when they practiced criminal law. I am going to tell you about three of those rules tonight, as a way of sharing with you some of my reflections on crime and punishment.

They are not in any particular order of importance, but, as it happens, the first of them comes out of my experience in that first criminal trial. The decision to give the brief for the defence to me was not quite as irresponsible as it seems. The accused had confessed to the murder on nine separate occasions. There was some weak but supportive circumstantial evidence. My boss, the Public Solicitor, thought that whatever I did could not make the case worse than had already been achieved by the client. Well, I decided that the inevitable conviction was not going to happen without a fight.

I discovered to my surprise – and, perhaps, to yours – that confessions could not be admitted into evidence if they were not voluntary. So I set out to establish, if I could, that my client's will to remain silent had been overborne. He could not exactly remember the precise circumstances in which he had made his admissions but it seemed reasonably clear to me that a completely uneducated Papua Nuiginian who had spent his entire life in a small village would not think he could refuse to answer a question put to him by a white police officer or patrol officer. As it happened, I succeeded in excluding from evidence the first confession, and the second, the third and the fourth. However, numbers five, six, seven eight and nine were duly received over my objection. To my astonishment the judge, who had been in PNG for many years, entered a verdict of Not Guilty. Not only did he do so for reasons that I had not articulated in my address, but for a reason that I had not even thought of. He acquitted because he thought the accused had confessed too often! He thought that it might well have been the case that the accused had been appointed to take the blame for the murder by the leaders of his clan. Hence his apparent eagerness to confess. The course I had embarked upon was technically correct, may I even say excellent and there were some statements in the High Court of Australia that gave it strong support. But it was, as a matter of practical reality, pointed in exactly the wrong direction.

It was after this experience that I formulated my first rule for preparing a criminal (or, indeed, any) trial: Face the facts.

This is one of the most difficult things to do when you have to fight a case. The temptation to brush aside inconvenient facts, to explain them away, to qualify them, to create an incomplete picture, is very strong, almost overwhelming. However, it is surprising how often, when facts are faced up to and honestly looked at, out of the murky fog a genuine case appears, a genuine case that is often a winning one because of that very thing. Facts have a logic of their own. When some facts are proved, other facts are likely. The most devastating experience I have had of facing the facts was an occasion when I was junior counsel being led by Barker QC for the Crown in the prosecution of a policeman for murder in Alice Springs. The prosecution sought to establish that the accused's story of having been attacked, thrown to the ground and assaulted with a club, which justified his shooting the deceased in self-defence, was false. Accordingly, we called expert evidence from a forensic scientist who knew everything that could be known about fibres. He said that he had examined the policeman's jumper with highly specialised equipment, positively pullulating with knobs and lenses and other twiddly things. But no red sand could be detected.

Marcus Einfeld QC appeared for the defence. His style of cross examination was usually fairly tough and aggressive but he started mildly enough. He pointed out one dirty mark. Yes, that could have been caused by a fall to the ground. He pointed to a small tear. Yes, that could have been caused by a kick. So could this mark and perhaps that. He decided that progress was too slow. He unwrapped the jumper and asked, "So doctor, you say there is no dust in this jumper"? The witness, replied, "I couldn't find any." Marcus suddenly flicked it up and down and a great cloud of red dust rose into the air. To his credit, Barker retained his composure. He adopted an expression of severe disapproval, as if to suggest that Marcus' antics were entirely inappropriate in a court of law and just made a circus of the trial. I confess that, regrettably, I responded somewhat differently. Mark Twain observed that there are occasions, such as hitting one's thumb with a hammer, when profanity brings relief denied even to prayer. I held my head in my hands and said words of which the general gist was, "Oh gosh". The case took another five days to end. But it was finished that afternoon.

I asked Marcus after the case, didn't he think that he taken a big risk. He said that he had, but formed the view that he had nothing to lose. Facing the facts.

In our own lives we need to face facts about ourselves. And we are very good at avoiding this task. Many men – and, I suspect, this is mainly men – are experts at rationalizing their workaholism. We call it responsibility, when it is actually greed or vanity or even cowardice. We call it duty when it is actually a way of avoiding what we know we should be doing: the wounded people lying in the road from Jerusalem to Jericho are so often not strangers but our wives and children and our friends. We call it day dreaming: Jesus called it adultery. When we call people fools, Jesus called it murder.

All of you with children will have gone through the bedroom-that-looks-as-though-the-computer-game-has-escaped syndrome. I was once complaining bitterly about this matter to my wife, Sue. The children just ignored me. It was not much to ask them to keep their bedrooms tidy. They lived in our house and should obey my rules. I am their father. She looked at me in that way wives do when they are just about to reset the male compass. Where do they get this skill from? Is it whispered to them on their mother's knee? What trick of evolution denied it to the masculine sex? It has been said that behind every successful man stands a surprised mother-in-law. There is, I think, much more to the X chromosome than meets the eye. Well, anyway, thank heavens its there. Sue asked me, "What is really at stake here?" This was a killer question. Sue would have made a very good barrister. Because what I realized was that, really, I was frustrated by my children's refusal to accept that I was boss. It was about power, not clothes on the floor. When I saw this was what really was at stake for me, it helped me to see that, in His wisdom, God had provided precisely the right solution to the problem, in giving each bedroom a door. Winnie-the-Pooh was a realist –

> *"When you wake up in the morning, Pooh", said Piglet, "what's the first thing you say to yourself?"*
> *"What's for breakfast?" said Pooh. "What do you say, Piglet?"*
> *"I say, I wonder what's going to happen exciting today?" said Piglet.*
> *Pooh nodded thoughtfully.*
> *"It's the same thing," he said.*

A very famous Christian theologian, Karl Barth, was asked whether he thought that Christianity was just a crutch. He asked in reply, "So, who is not limping?"

Lent is a good time for facing facts.

The next rule of criminal practice that I told the young barristers about is this:

> The rule of law is more important than the sleazebag in the dock.

It is very important that I point out immediately that the person in the dock is, more often than not, not a sleazebag at all. Very often he or she will be someone facing catastrophe brought about by a combination of events over which they have no control and personal shortcomings and inadequacies resulting from or at least contributed to by their personalities, backgrounds and upbringing. But these people, for whom one might well have human sympathy, despite their crimes, do not challenge the rule of law. But it is under challenge every time a sleazebag comes to trial, especially if the alleged crime is a nasty one. The Prosecutor is tempted to bend the rules designed to ensure a fair trial, to keep undisclosed information that might assist the defence for example or to press prejudicial rather than rational lines of reasoning on the jury, while defence counsel is tempted not to test the evidence properly.

Let me assure you that when you have to cross-examine a ten-year-old child to suggest that her evidence that she has been sexually abused by her father is false, the temptation to put a few perfunctory questions is very strong. The advocate must remember that he or she undertaking a necessary task – that of ensuring no one is convicted of a serious crime which is denied unless the charge be proved beyond reasonable doubt – and testing the evidence properly is an essential part of that process. The jury also will need help to be reminded that the advocate is performing a necessary office, that he or she is an instrument of justice, and that they too must bring to bear a cool and rational mind to the evidence, uninfluenced by personal opinions about the accused or the ghastliness of the crime.

Even the most repellent person can be innocent and the most dreadful crime fail to be proved beyond reasonable doubt. The rule of law, of which the process of fair trial is but one element, is one of the most important ethical foundations of a civilized and humane society, even though it stands in the way of politicians trying to score cheap points and against the mindset of radio talk-back land.

The rule of law applies because we are the sort of society that we are. It applies because the rules are not made by the criminals; nor do criminals set the standards of criminal justice. The rule of law represents, not our respect for the criminal, but our self respect, not what we owe the criminal but what we owe to ourselves. It is not surprising that it is difficult to do and that sometimes a high price is paid to do it. It comes out of our history, a long and difficult history, and not a little blood has been spilt in its defence. It has been dearly bought and must not be cheaply sold in the marketplace of expediency. Each of us has an interest in its maintenance.

The principle was put succinctly and persuasively by Robert Bolt in his play about Sir Thomas More, "A Man for all Seasons". This particular anecdote is, as it happens, an adaptation by Bolt of a conversation with More recorded by his son-in-law, William Roper, who himself held a legal office and wrote a biography of his father-in-law. More had employed a law clerk called Rich who, when he was denied promotion, left his service and went across to Thomas Cromwell, More's enemy. Roper urged More, who was then still the Lord Chancellor, with immense powers, to arrest Rich before he could betray him. More asked Roper whether Rich had broken any laws and Roper replied that he had broken God's laws. More suggested that God should therefore arrest him. Roper in disgust protested that More would give the benefit of law to the devil himself. More's reply was this –

> *"Yes, I would, for my own sake. This country England is planted thick with laws from coast to coast. If you, when chasing the devil, were to cut them down, what would you do when you got to the end and he turned on you, the laws all being down; and do you really think that you could stand in the winds that would blow then?"*

The rule of law is also more important than the client. The rule of law comprises more than merely the right to a fair trial. Its maintenance depends on lawyers who respect the truth and whose integrity is not for sale. These qualities cannot be guaranteed by disciplinary tribunals, however powerful. They must be rooted in the very way in which lawyers do business for their clients. In this respect, there is no difference between the exchange in a court room and in a conference room, between a lie told to a judge and a lie told to the other side in a commercial negotiation.

It is the most fundamental distinction between the law as a profession and law as a business enterprise and it draws a line between the legal practitioner and the mere mouthpiece.

Christians should know all about this rule. For God's love is unconditional and does not depend on who we are but on what He is like. He loves to forgive and be reconciled, not because we are lovable or easily seek to be good, but because, despite everything, He loves us and desires a relationship of Father with us. Somehow, I am convinced, in a way connected with Jesus' life and death, God has found a way in which truth and forgiveness can both work, indeed, are part of the same eternal fact.

Let me come to some matters of history.

The crime of petty treason was committed by uttering forged coins and whenever a subordinate killed or attempted to kill or conspired to kill his or her superior. An employer or a husband or a priest was regarded as superior. The mandatory punishment for women was being burnt at the stake.

In 1786, William Wilberforce attempted to get Parliament to discontinue the burning of these women. Lord Loughborough, the Lord Chancellor, who was for some time a Ruling Elder of the General Assembly of the Church of Scotland, opposed this reform. He did so for the reason that the spectacle was likely to make a stronger impression as a deterrent on those who saw it than mere hanging, and no more pain was inflicted "because the women were always strangled before the fire got near them". In fact, "always" overstated the case. The punishment was abolished in 1790. The crime remained until 1826. This was a little more than 200 years ago but fourteen centuries after Christianity became a significant part of the power structure of the State.

In 1800 a ten year old boy was sentenced to death for secreting notes at a post office (a form of larceny). The judge thought it necessary to pacify the feelings of horror in the crowded court by stating "the necessity of the prosecution and the infinite danger of its going abroad into the world that a child might commit such a crime with impunity, when it was clear that he knew what he was doing" and hinting "slightly" at the possibility of the exercise of the prerogative of mercy. The sentence was commuted and the boy was sent to Grenada for fourteen years under a private arrangement with a member of the grand jury who had estates there. Such arrangements were often flagrantly corrupt and little more than slavery, with the prisoners being bought and sold.

Very few survived for long.

In 1785 the Solicitor-General stated in the House of Commons that out of every twenty offenders executed in London, eighteen were under the age of twenty-one. There are many examples of children between the ages of eight and thirteen being sentenced to death as late as 1814. In that year a boy of fourteen was hanged at Newport for stealing. Even as late as 1833 a nine year old boy was given the death penalty for pushing a stick through a cracked window and pulling out some printers' inks worth twopence. Following the Gordon Riots in 1780, of twenty five executed, seventeen were under eighteen years of age and three were only fourteen.

Although in the second half of the 18th century the actual execution rate of offenders sentenced to death ranged from 50% to 75%, equally for minor capital offences as for serious ones, by the early 19th century executions for capital property offences, such as stealing privately in shops or dwelling houses unaccompanied by aggravating circumstances occurred in perhaps less than 10 percent of cases. In 1785 in London and Middlesex, of the 97 persons executed, only one was convicted of murder, the rest were property offences not involving violence to the person. This was not an unusual year. It is generally accepted that, by this time, executions had become less frequent than earlier in the century. The number continued to fall. In England and Wales in 1810, there were 481 capital convictions for property offences and 55 executions but only one (of 67) of these was for stealing in a dwelling house to the value of 40 shillings (it should be noted that juries would frequently find that the most valuable items somehow never quite got over the forty shilling mark); four out of five were executed for sodomy, whilst nine of fifteen were executed for murder and only two out of thirteen for shooting, stabbing and administering poison with intent to murder.

In 1810 a Bill to repeal the death penalty for theft in dwelling houses to the value of forty shillings was lost in the House of Commons, despite the support of William Wilberforce but the Bill amending the Act which punished stealing privately in a shop to the value of five shillings with death was passed. In the House of Lords, the Bill was opposed by both the Lord Chancellor and the Lord Chief Justice, who claimed the support of the judges. The argument apparently most (but insufficiently) persuasive favouring reform was not that the law was unduly harsh but that it was becoming increasingly difficult to obtain convictions from juries.

The House of Lords rejected the Bill by a majority that included all seven bishops who were present. A further attempt in 1816 failed, although it was disclosed in debate that a ten year old boy was then confined in Newgate prison under sentence of death for shoplifting. It was also mentioned in debate that, in 1814, the Recorder of London had stated from the bench at the Old Bailey that "it was the determination of the Prince Regent, in consequence of the number of boys who had been lately detected in committing felonies, to make an example of the next offender of this description who should be convicted, in order to give an effectual check to the numerous instances of youthful depravity".

The Attorney General explained, in all seriousness, that it was necessary to execute these children because a very large proportion had been instructed by their parents to steal in the hope that they would escape punishment because of their age. (We have, you might think, heard not dissimilar arguments on the necessity to detain the wives and children of asylum seekers.) Reform failed again in 1818 despite compelling evidence that juries repeatedly found, contrary to the plain fact, that the stolen goods were worth less than five shillings or had not been stolen privately.

In 1813 and then 1823 and 1827, Sir Robert Peel managed to procure repeal of some capital penalties, including for larceny in a number of circumstances. By 1839 most of the property offences were no longer punished by sentence of death. The offences that remained were, with one exception (buggery, "either with mankind or any animal"), seriously violent or dangerous. The death penalty for felonies except murder, high treason, piracy with violence and destruction of public arsenals and dockyards was eventually abolished in the mid-19th century. The impetus for this reform did not arise as an expression of Christian morality, although it provided some of the vocabulary.

The reforms of these dreadful laws, which took so long, did not come about as the result of any campaign by any recognizable section of the Church, let alone the whole Church, although many of those who sought reform would have regarded themselves as Christians, as also did many of those who fought them tooth and nail. In the resolutely Christian United States, a man was recently sentenced in California for stealing a packet of vitamin tablets from a drug store to life imprisonment. Over ten years previously, he had been released after serving a long sentence for robbery.

In California alone, there are presently about 350 people serving life sentences under the three strikes laws whose third crime was petty theft, often of goods worth no more than a few hundred dollars. The churches are silent. Indeed, they approve as also, it seems they think, would Jesus.

So far as the measure of punishment is concerned, two important texts, in particular, seem to me to provide, on analysis, important insights into a Biblical principle of punishment for crimes. Exodus chapters 21 and 22 deal with property offences and crimes of violence, and contain with the well known instruction to "give eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe". This can only be regarded as an insistence that punishment must be proportionate to the crime.

Somewhat less obviously relevant, but I think very important in this context, is Jesus' analysis of the Law as related in St Matthew's Gospel (Matt 5:21-22, 27-28, 31-32, 33-34, 38-39, 43-44). These words will have a familiar ring: "You have heard that it was said to those of old...But I say to you that..." In these passages, Jesus is speaking of the Law – of murder, adultery, divorce, solemn undertakings, retribution, relations with strangers – and how it should be rightly understood. In this, Jesus goes to the heart of the Law. Less obvious, perhaps, but nevertheless significantly, He is also demonstrating its limits. For Jews, the Law was applied by force of the authority of the religious rulers and the royal government. Of necessity, much of the law was executed by the communities in which the wrongdoer lived. It is obvious that, to take a couple of examples, an actual killing could be the subject of punishment, as could adultery. But punishment for thoughts would destroy the community.

Of course, Jesus had nothing of the sort in mind. Indeed, His very point was to emphasise the difference between the external actions to which the Law attached its punishments and the spiritual reality which the Law reflected. He did not suggest that the Law was inadequate but rather that compliance with it, though a moral duty, was no sign of true righteousness. And that, one way or another, all of us have failed the test. Not only that, but failure is inevitable.

(The lack of a theoretical, as distinct from a metaphorical, Biblical social philosophy may be an important reason why humanism has had such a significantly greater and more beneficial influence on theories of law and government than Christianity, though no doubt it has been influenced by Christian thought in its turn.

Moreover, the philosophical ideas underlying humanism have been open to the influence of scientific reasoning and discovery in a way that the post-medieval Church found almost impossible to accept (see Jean Gimpel, *The Medieval Machine: The Industrial Revolution of the Middle Ages*, Penguin 1977). It is surely no accident that as the power and influence of the church waned, society became more humane and, with it, the criminal law. In places where this did not happen – such as Nazi Germany or Soviet Russia – the power elites sought to replicate the control of the church over mind and heart, using methods no more ruthless, though considerably more efficient, than the church in its long and bloody history.)

The idea that people have rights as distinct from duties does not appear to be a Biblical idea at all. Moreover, the source of duty (say, towards, widows, orphans and strangers) is not the inherent worth of the other but the command of God who cares for that other. Yet the idea of human rights, both individual and communal, appears to be the most powerful theme running through virtually every positive social change over the last 200 years. The genesis of the notion of such rights seems rather to lie in Greek and Roman antiquity than in Christian thought.

It seems impossible to escape the damning conclusion that the Church contributed almost nothing to the cause of justice, let alone kindness and humility (to use Micah's succinct description of the will of God); indeed, most Christians and certainly most churches have consistently opposed changes that might have given more rational, more fair or more humane justice. Virtually all the reforms of the 18th and (especially) the 19th centuries have been brought about by people articulating essentially secular humanist and rational notions of the social order and the nature of human beings and, more recently, by democratic forces asserting human rights. They were impelled by much the same intellectual and social ideas that both led to and were significantly influenced by the development of science, and commitment to the central role of reason in human life which had gathered force since the astonishing discoveries of Kepler, Copernicus, Galileo, Newton, Darwin and a host of others like them.

I do not think it can be seriously contended that any substantial legal, social or political advance, even in the modern era, has been marked by a Christian consensus, with the possible exceptions in the USA of the extension of civil rights to Afro-Americans in the 1960's and 1970's and the changes to the Australian Constitution concerning indigenous Australians in 1967.

Even then, the Christian consensus reflected the social consensus. The devastating analysis of the relations between the church and the National Socialist State by Bonhoeffer (see *Ethics* and *No Rusty Swords* Collins, 1965) shows how the (Lutheran, but the analysis applies to all the churches), Church in Germany not only failed to combat Nazism but became complicit it its crimes. It seems frighteningly true that there is no reason to suppose that, given similar conditions in other cultures, there would have been a different outcome. By way of example, consider the role of the churches in apartheid South Africa or in (especially) southern USA or, more recently, the failure of the Serbian Orthodox Church to take a stance against the atrocities committed by Serbians in Kosovo. So observed, the Church appears to be less a light on the hill than a chameleon, taking its colour from its environment.

It seems, then, that the Church, as such, has generally adopted and reflected the dominant notions of the society in which it has operated from time to time, whether they were brutal, cruel, acquisitive, irrational, unjust or (latterly) liberal. Papal statements, for example, about aspects of social and political life (with the possible exceptions of abortion and birth control) seeking to apply Christian values to the secular world may fairly be seen as demonstrating rather than refuting this conclusion. Statements of abhorrence of anti-Semitism mainly post-date the Holocaust, in line with – and significantly later than – secular humanist ethics.

The mere fact that some persons in leadership roles in the Church assert standards at odds with some conventional opinions, for example on economic rationalism, reconciliation, indigenous land rights or the environment is no indicator of what most members of their churches think, let alone their Christian members. Are they prophets or, more likely, just a statistical representation of the range of political and social opinions you might find in any large group? After all, the Church has had sixteen hundred years (dating from its rise to power in the State) to discover, without success, an independent moral source, that is, one independent of the surrounding culture. In this context the modern attack by conservative theologians on secular humanism should be seen, I think, as a sinister development.

A number of contemporary legal issues illustrate this point. Let me take three examples from our own recent legal history.

The first is the reform of the criminal law concerning homosexual behaviour. The law provided prison sentences of up to 14 years for homosexual men who, to use general language, had sexual relations, though they were adult and though it occurred in private. Homosexual women were not subject to any such charges.

When it was proposed to amend the legislation to decriminalise consensual sexual acts in private between men 18 years and older the churches protested. It was never seriously suggested that sexual acts between consenting adults in private warranted, because of their inherent wickedness, a prison term. It could not, really, because there was never any suggestion that, for example, adultery or mere fornication, should become crimes. St Paul was at least as condemnatory of these sins as of homosexual intercourse and the Old Testament law required the lot to be stoned to death.

Of course, many otherwise apparently respectable church-going persons, possibly representing the majority, might have been offended by it being proposed not only that they should go to Hell but that they should first be put in prison. Rather, they chose to focus on the sexual behaviour of a minority, hatred or at least contempt for whom was already part of the agenda of prejudice in the community of which most Christians thereby demonstrated that they considered themselves a part.

The argument that was usually heard was that it was necessary to send these men to prison, or at least threaten to do so, to deter others from committing the same acts, without reference to the extent of punishment which the behaviour itself actually deserved. Again, this was not surprising, having regard to the fact that the vast majority of people would not for a moment have stomached a law which made criminal consensual but illicit heterosexual activity by adults.

Thus these laws breached the principle of equality of responsibility for what are, in point of conventional Christian morality, the same acts. The requirement of general deterrence is one of the fundamental elements of the law of sentencing. However, it cannot, in law, justify a sentence which is more harsh than that which the wrongful act actually deserves. In substance, its effect is to qualify the extent of mitigation that might otherwise be applied because of the personal circumstances of the offender.

The fact is, of course, that men were not merely threatened but actually convicted and imprisoned for consensual homosexual intercourse and this in recent times. Since it is obvious that such behaviour could not justify this punishment, they were punished for the potential acts of others. The law also had the entirely predictable effect of providing fertile ground for blackmail, extortion and violence, sometimes by police. The gross injustice of this law is obvious. Many, perhaps most, Christians – and especially evangelicals – simply ignored and ignore these issues.

The fundamental immorality of this kind of law is that it treated homosexuals, not as persons, but as instruments of policy. In other words, they were de-humanised. Now, I do not know any words in the Scriptures that, in terms, denounce treating persons as mere instruments of social policy. But the response of Jesus and even, I think, of St Paul, to such an idea is scarcely susceptible of any doubt.

It is impossible for Christians to justify the law's treating consensual homosexual behaviour so differently from consensual but illicit heterosexual behaviour, whilst both are condemned by them as equally immoral. Christian support for the law was not calculated to do justice but, instead, to do injustice.

I hope that this analysis is useful for informing an appropriate Christian approach to the issue of drug law reform, the second example I wish to cite. It was depressing indeed to hear the response of the Salvation Army to the proposals of the recent NSW Drug Summit but I rather think that these views are widespread in the churches. As I understand it, it is not so much that addicts deserve prison sentences or to die from overdoses or AIDS or hepatitis but rather, to prevent others from taking drugs, those who do must be punished. This is to say, being affected by opiates or hallucinogens is not so inherently wicked that gaol is a just punishment. This would be an impossible position for two reasons: first, having regard to the law's response to other forms of dangerous intoxication, the Christian prerequisite for justice of equality of moral responsibility is not satisfied; and, secondly, no rational person could genuinely hold the opinion that self-induced intoxication of the type caused by, say, heroin, deserved imprisonment, especially in the prison environment of this State.

Last year I sentenced a man to a lengthy term of imprisonment for murder. He was a heroin addict. He had murdered Paula for her heroin. According to the law, Paula's heroin use was criminal. She had been using since she was sixteen. Because supply to her of the drugs she used was a serious crime, it was profitable for someone to do it. It is not surprising, therefore, that someone did. Maybe the drug laws do some good. But this comes at a high price. This is not acknowledged, let alone paid, by the lawmakers, who accept no personal moral responsibility. They, however, profit in other ways. The cost is paid, though only in part, by addicts, their families and their victims. The black market created by the law means that the only way that most addicts (excepting, of course, the rich) can support their addiction is by dealing or illegal depredations on the community. Some, like Paula, become prostitutes.

The position adopted by those opposing the provision of safe injecting rooms seems to be justified by two arguments: the first is that it is wrong to provide the means to break the law; and the second is that this encourages addicts to use drugs and "does not send an appropriate message to young people". The first argument is, at best, only distantly related to Christian ethics and is not a Christian argument in any important sense. The second argument is a restatement of the instrumentalist philosophy which is essentially anti-Christian: whatever cant might be used to disguise it, .it exploits with callous indifference the sickness and death which would otherwise be avoided. There is no doubt about how Jesus would deal with that attitude. If the present laws are to remain in place, they must be justified by Christians on completely different grounds.

It is obvious, from what I have already said, that mandatory sentencing laws, such as exist in Western Australia and the Northern Territory, as well as in many States of the USA cannot be justified by any Christian ethical view. They impose arbitrarily harsh punishments without regard to the actual gravity of the offence or the actual circumstances of the offender.

They also contradict fundamental elements of the rule of law in a liberal democracy, namely, the right of persons to be treated as individuals and not as merely one of a class or caste, and the independence of the judiciary. Politicians place their thumbs on the scales of justice and the judges are required to deal out the corrupted measure.

None of the Churches have, so far as I am aware, attempted to call attention to the injustices inherent in and caused by laws of the three kinds that I have mentioned, still less to enter the debate about them, even less to take the side of the people oppressed by them.

As I have considered these matters, my commencing assumption that my Christian faith, considered as a system of moral rules about the world, about behaviour, and about attitudes, informed my work as a barrister and informs my work as a judge, starts to look unconvincing. The requirements of integrity, of truthfulness, of justice are, if they are worth anything, part of the very warp and woof of reality. In no sense are they unique to Christianity. They are part of the human experience, I would say, the human experience of God, but the label does not matter. In the end, I think that for me, in my work, the Good News is that on the road there will be one who moves out of the shadows to join my walk , someone who knows the road all too well and whose companionship gives me hope that, when the day comes, the Light will be a welcome friend.

The third rule came to me long before any of these others. When I left school at the age of 17 to undertake my part-time law degree and articles as a law clerk, I went to work in a commercial firm presided over by a solicitor who had come here from Austria as a refugee from the Nazis, for political rather than racial reasons, shortly before the war. He had joined the AIF and fought in New Guinea. He was a devout Catholic. We had a client who was particularly unpleasant: arrogant, rude, not altogether honest, manipulating. My master solicitor did not like him so, as an articled clerk, I had to attend conferences with counsel and the like whilst we conducted a quite large commercial litigation for him. When he lost his case, I commented that he got what he deserved. My master solicitor looked at me carefully for a moment and then said, “Michael, may none of us get what we deserve”.

That is not a bad Lenten prayer.