

## LESSONS FROM HISTORY IN DEALING WITH OUR MOST DANGEROUS

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*The conundrum of dealing with dangerous sexual offenders is one that has never been too far from the public and legislative consciousness. Striking an appropriate balance between community protection and the human rights of the offender is a difficult task and one weighed down by many competing considerations. In this article, we survey historical and contemporary punishment of dangerous sexual offenders in order to inform that debate. Measures adopted or employed by political communities to respond to such offenders should be chosen with an eye to history. This article argues that such measures are often adopted as a cure for public fear, and as such, they risk being overzealous, imprecise, disproportionate, and unjust. Reflecting on this history, we provide three points that should guide legislative and executive responses when dealing with our most dangerous.*

‘History never repeats itself; but it rhymes’.<sup>1</sup>

### I INTRODUCTION

In early 2011, officers of the Legal Aid Commission of Western Australia stumbled across the case of Gregory John Yates. Mr Yates was an intellectually disabled man convicted of sexual offences who had by that time been incarcerated for 23 years for a crime that carried a maximum penalty of 20 years. Mr Yates had been sentenced to seven years’ imprisonment, after the expiry of which he was to be detained ‘during the Governor’s pleasure’.<sup>2</sup> That indeterminate sentence was imposed in part for his own benefit (by affording him

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1 Mark Twain, quoted in John Robert Colombo, ‘A Said Poem’ in *Neo Poems* (Sono Nis Press, 1970) 46.

2 *Yates v The Queen* (1987) 25 A Crim R 361, 362 (Burt CJ).

a shorter non-parole period),<sup>3</sup> but no inquiries had apparently been made since his first appeal more than two decades earlier. When an appeal was brought in the High Court it was unanimously allowed and his immediate release was ordered.<sup>4</sup>

The conundrum of dealing with dangerous sexual offenders is one that has never been too far from the public and legislative consciousness. Understandably, it attracts emotive responses from those who have been, or who fear they or their families might become, victims of crime. On the other hand, the history of treatment, incarceration and preventative detention of sexual offenders considered to be dangerous is punctuated with examples of excessive or misguided responses. While Mr Yates' experience appears to owe more to forgetfulness rather than malice, a survey of historical and contemporary responses to sexual offences reveals that efforts to respond to public fear and panic frequently cross that line.

This debate is a familiar battleground for the old foes of security and liberty, with crossfire between the judiciary and the executive. Both battles are now several centuries old and no doubt much powder is still dry. These issues will continue to be the subject of examination by parliamentary committees and expert bodies having regard to socio-political developments and the prevailing attitudes of the day.<sup>5</sup> As Michael Tonry notes, however, '[c]oncluding that particular policies or practices are consonant with current sensibilities is ... the beginning but cannot be the end of assessments of their legitimacy'.<sup>6</sup> Legislative and executive responses to protect the community from dangerous sexual offenders should be developed with an eye to history. As this article demonstrates, a number of lessons can be learnt from that history, chief amongst them that legislation borne of fear has not always been effective, and has often been unjust or inappropriate.

This issue is not only of academic concern. Not infrequently, reforms are proposed that would be ineffective or displace fundamental human rights or both. For example, in September 2017 the federal Coalition Government introduced a Bill to impose mandatory minimum sentences for sexual offences against children,<sup>7</sup> notwithstanding the absence of evidence that mandatory sentences have the effect of reducing crime rates (see Part IV). A few months earlier, Commonwealth Senator Derryn Hinch renewed his campaign for a nationwide

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3 As recognised by the Full Court of the Supreme Court of Western Australia in *Yates v The Queen* (1987) 25 A Crim R 361, 364 (Burt CJ), 369 (Brinsden J).

4 *Yates v The Queen* (2013) 247 CLR 328, 342 [41] (French CJ, Hayne, Crennan and Bell JJ), 343 [46] (Gageler J).

5 For a recent comprehensive examination of this question in Victoria, see David Harper, Paul Mullen and Bernadette McSherry, 'Advice on the Legislative and Governance Models under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic)' (Report, Complex Adult Victim Sex Offender Management Review Panel, November 2015).

6 Michael Tonry, *Thinking About Crime: Sense and Sensibility in American Penal Culture* (Oxford University Press, 2004) 6.

7 Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017 (Cth).

public sex offender registry,<sup>8</sup> despite studies consistently demonstrating that such regimes are ‘not effective strategies for reducing sexual offending’, and in fact, may have considerable negative consequences (see Part V).<sup>9</sup> Similarly, the New South Wales Government is pressing forward with plans to introduce voluntary chemical castration of child sex offenders, despite no evidence as to its effectiveness (see Part II). In an unusually direct illustration of emotive legislating, Justice Minister Troy Grant declared that if it were up to him, he ‘would take their nuts off’.<sup>10</sup>

Reducing the prevalence of dangerous sexual offences, and dealing with our most dangerous, is of course an important and challenging task. For this reason, it requires effective and proportionate responses. Laws that sate public appetite for a response are not necessarily laws that effectively deal with that problem or do so in a proportionate and justifiable way. In this article, we undertake a historical and contemporary survey of criminal justice responses to sexual offences. We examine corporeal punishment (Part II), indeterminate detention (Part III), mandatory sentencing (Part IV) and registration and notification (Part V). Finally, in Part VI, we reflect on this material and ask what lessons can be learnt from the past. Two themes emerge from the historical survey: the response of the criminal justice system to dangerous sexual offenders has changed over time, particularly in recent history, reflecting shifting approaches towards the governance of risk; and extreme measures often follow severe but isolated incidents. Three lessons for legislators and the executive emerge from this consideration, but one key point is worth noting at the outset. Criminal justice responses must more accurately determine when notions of dangerousness are merely imagined or distorted by public fear and panic. At the same time however, legislation and policy should recognise that the predication of future risk is inherently challenging and may be empirically impossible. Squaring this circle does not mean abandoning the protection of the community. Rather, where cogent evidence indicates an unacceptable level of risk to the community once any prospective and punitive sentence has expired, responses should lie in therapy and treatment and not retribution and punishment for the predicted future acts.

## II CORPOREAL PUNISHMENT

In earlier times, sexual offenders, dangerous or otherwise, and indeed all who committed serious wrongs, were subject to a wide range of ‘seemingly brutal,

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8 Rachel Baxendale, ‘Derryn Hinch Renews Push for National Public Paedophile Register’, *The Australian* (online), 13 June 2017 <<http://www.theaustralian.com.au/national-affairs/derryn-hinch-renews-push-for-national-public-paedophile-register/news-story/00df906fb27e54012e869a596fa573a9>>.

9 Arie Freiberg, Hugh Donnelly and Karen Gelb, ‘Sentencing for Child Sexual Abuse in Institutional Contexts’ (Research Project, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015) 213.

10 Ashleigh Raper, ‘“I Would Take Their Nuts Off”, but Chemical Castration for Sex Offenders “Appropriate”, NSW Minister Says’, *ABC News* (online), 9 May 2017 <<http://www.abc.net.au/news/2017-05-09/changes-to-nsw-sentencing-laws-chemical-castration/8510426>>.

frequently bloody, and at times spectacular' corporeal punishment.<sup>11</sup> The crime of rape, conceived of as a serious property offence against a father or husband, was treated no differently, though often the rapist could buy his freedom by paying a fine to the woman's household, whose 'goods' were damaged.<sup>12</sup> In England, prior to 1066, rape of propertied virgins was punishable after trial by ordeal by death and dismemberment, including for the rapist's horse and dog.<sup>13</sup> After the Norman Conquest, it was punishable after trial by combat by castration and, optionally, blinding – often dealt by the victim herself.<sup>14</sup> By contrast, the same crimes in relation to propertied non-virgins or unpropertied virgins were dealt with in manorial courts and punishable only by 'chastisement falling short of loss of limb'.<sup>15</sup>

A statutory age of consent was recognised as early as 1275. Under Edward I, the offence of 'ravish[ing]' a 'maiden within age' (under 12 years old) with or without her consent was punishable by two years' imprisonment and fine at the King's pleasure,<sup>16</sup> though the penalty for rape was increased to death 10 years later, and the potential for exoneration by marrying the victim was simultaneously removed.<sup>17</sup> Under Elizabeth I, the age of consent had been lowered to 10, and the 'abominable wickedness' of carnally knowing and abusing a child under that age was made a felony.<sup>18</sup> In 1861, the age of consent was raised back to 12;<sup>19</sup> statutory amendment raised this further to 13 in 1875,<sup>20</sup> and in 1885 to 16,<sup>21</sup> where it remains today in most Australian jurisdictions for heterosexual statutory rape.<sup>22</sup>

In the Middle Ages, sexual crimes were dealt with by ecclesiastical courts charged with protecting morals and the family unit.<sup>23</sup> From 1558, the Court of High Commission dealt, in parallel with the church, with 'unusual sexual and family practices' such as adultery, bigamy, immorality and blasphemy, and the

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11 Trisha Olson, 'The Medieval Blood Sanction and the Divine Beneficence of Pain 1100–1450' (2006) 22 *Journal of Law & Religion* 63, 63.

12 See, eg, *The Code of Hammurabi* (Robert Francis Harper trans, University of Chicago Press, 1904) 55 § 156; *The Holy Bible*, Deuteronomy 22:28.

13 George E Woodbine (ed), *Bracton on the Laws and Customs of England* (Samuel E Thorne trans, Harvard University Press, 1968) vol 2, 414–15, 418.

14 Frederic William Maitland, Leveson William Vernon Harcourt and William Craddock Bolland (eds), *Yearbooks of Edward II Vol V: The Eyre of Kent 6 & 7 Edward II AD 1313–1314* (Selden Society, 1910) vol 1, 134, cited in Olson, above n 11, 69 n 19.

15 Woodbine, above n 13.

16 *Rape Act 1275*, 3 Edw 1, c 13. See also *R v J* [2005] 1 AC 562, 587 [72] (Baroness Hale).

17 *Forfeiture of Dower, etc Act 1285*, 13 Edw 1, c 34.

18 *Benefit of Clergy Act 1575*, 18 Eliz 1, c 7; William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) book 4, 212.

19 *Offences against the Person Act 1861*, 24 & 25 Vict, c 100, s 51.

20 *Offences against the Person Act 1875*, 38 & 39 Vict, c 94, s 4.

21 *Criminal Law Amendment Act 1885*, 48 & 49 Vict, c 69, s 5(1).

22 For a discussion on the age of consent in relation to homosexual sex, see: Harry Hobbs and Andrew Trotter, 'How Far Have We Really Come? Civil and Political Rights in Queensland' (2013) 25 *Bond Law Review* 166, 190–3.

23 Michael Kirby, 'The Sodomy Offence: England's Least Lovely Criminal Law Export?' (2011) 1 *Journal of Commonwealth Criminal Law* 1, 3.

secular body appears to have administered harsher penalties.<sup>24</sup> The common law and statutes gradually carved jurisdiction away from the courts, with ‘unnatural offences’ criminalised by statute during the reign of Henry VIII,<sup>25</sup> and bigamy criminalised in 1603.<sup>26</sup> Both Acts were abolished with the English Civil War and displacement of the monarchy in the mid-1600s, and the High Commission was restored in 1660.<sup>27</sup> The ecclesiastical courts were largely reduced to divorce proceedings until the establishment of specialised courts for that purpose in 1857.<sup>28</sup>

Sexual crimes were framed in particularly ambiguous terms in colonial America, where fornication, ‘lewd and lascivious’ or ‘wanton’ behaviours were commonly prosecuted.<sup>29</sup> Those convicted of fornication, adultery or delivery of illegitimate children were punished with public whippings in the marketplace to deter others, and to reform the offender. The object of the punishment of sexual offences and of the criminal law in general remained the enforcement of the law of God rather than protection of the community or any reformatory element.<sup>30</sup>

There was some break with religion in colonial America, insofar as rape became the first offence to attract a capital punishment without reference to the Bible.<sup>31</sup> Where the offender’s life was spared, punishments involved lashings, slitting his nostrils, or prohibition on appearing in public without a halter around his neck.<sup>32</sup> Nonetheless, religion retained an important role. Despite a relatively diverse taxonomy of offences, court records of colonial Massachusetts indicate that in the late 1700s a majority of cases were offences against God and religion.<sup>33</sup> Intercourse by a married man with an engaged or married woman was adultery and punishable by death; but if the woman was not married it was punishable only as fornication by 10 stripes or five pounds.<sup>34</sup> From 1692 to 1780, the punishment for adultery was reduced to 40 lashes and an hour in the gallows with a rope around the neck, ‘to impress upon the culprit that his behaviour was “deadly serious”’.<sup>35</sup> Those convicted were required to wear a visible letter ‘A’ on their clothing for the rest of their lives, on pain of 15 lashes; those convicted of incest were subjected to the same punishment with the letter ‘I’.<sup>36</sup> Sodomy and bestiality were punishable by death until 1805, as were rape or carnal knowledge

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24 Committee on Psychiatry and Law, ‘Psychiatry and Sex Psychopath Legislation: The 30s to the 80s’ (Publication No 98, April 1977) vol 9, 845–6.

25 *Buggery Act 1533*, 25 Hen 8, c 6. Although the *Buggery Act 1533* was repealed by Mary I (1 Mar, c 1) in order to restore the traditional jurisdiction of the Church over this subject matter: Kirby, above n 23, 4. It was restored in 1563 by Elizabeth I (5 Eliz 1, c 17).

26 *Bigamy Act 1603*, 1 Jac 1, c 11, s 1.

27 Committee on Psychiatry and Law, above n 24, 846.

28 *Matrimonial Causes Act 1857*, 20 & 21 Vict, c 85.

29 William E Nelson, ‘Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective’ (1967) 42 *New York University Law Review* 450.

30 Ibid 452.

31 Committee on Psychiatry and Law, above n 24, 849.

32 Ibid 851.

33 Nelson, above n 29, 452.

34 Committee on Psychiatry and Law, above n 24, 849.

35 Ibid.

36 Ibid.

of a child under 10 well into the 1800s.<sup>37</sup> The link between crime and sin implied that any man was susceptible to either, and some authors have suggested that this was reflected in punishments such as sale into servitude over imprisonment, favouring reintegration into society over exclusion from it.<sup>38</sup>

With the abolition of the death penalty and other forms of corporeal punishment, practices such as these have since faded into the history books. One outlier in this regard is the reintroduction of chemical castration. The first documented use of chemical castration to reduce pathological sexual behaviour occurred in the United States in 1944, when diethylstilbestrol, a progesteronal hormonal compound, was prescribed to lower male testosterone.<sup>39</sup> Of course, efforts to decrease male testosterone are not limited to the chemical kind. During the late 1800s, a doctor in the US state of Indiana surgically castrated almost 180 male prisoners to reduce their sexual urges. As a result of these efforts, ‘Indiana began using physical castration to decrease recidivism of certain prisoners’.<sup>40</sup>

Chemical castration has increasingly been adopted around the globe. In recent years, the United Kingdom, Russia, Israel, India, South Korea, and several US states have introduced chemical castration laws.<sup>41</sup> In Australia, Queensland, New South Wales and Western Australian courts can impose chemical castration for ‘dangerous sex offenders’ on release from prison in order to reduce sex drive and the capacity for sexual arousal.<sup>42</sup> In New South Wales, the government has proposed extending this to power to make chemical castration a judicial sentencing option.

Corporeal punishment was once common for all offenders, whether considered dangerous sexual offenders or not. Over the years however, such punishments have increasingly been viewed as inhumane, and infliction of corporeal punishment following a sentence by a court of law has been abolished in most countries. While this may reflect growth in humanitarian ideals and a global diffusion of human rights, others have suggested less charitable reasons. For instance, Michel Foucault famously argued that corporeal punishment was an expression of state power. Reflecting on the historical shift away from public acts of corporeal punishment across the 19<sup>th</sup> century, Foucault suggested this

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37 See Edwin Powers, *Crime and Punishment in Early Massachusetts 1620–1692: A Documentary History* (Beacon Press, 1966).

38 Nelson, above n 29, 454–5. See also Raquel Blacher, ‘Historical Perspective of the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill’ (1995) 46 *Mercer Law Review* 889, 893.

39 Robert D Miller, ‘Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?’ (1998) 4 *Psychology, Public Policy, and Law* 175, 181.

40 Charles Scott and Trent Holmberg, ‘Castration of Sex Offenders: Prisoners’ Rights versus Public Safety’ (2003) 31 *Journal of the American Academy of Psychiatry and the Law* 502, 502.

41 David Millward, ‘Australia Considers Compulsory Chemical Castration for Paedophiles’, *The Telegraph* (online), 28 August 2015 <<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11829782/Australia-considers-compulsory-chemical-castration-for-paedophiles.html>>.

42 Ibid. See further Maggie Hall, ‘Treatment or Punishment? Chemical Castration of Child Sex Offenders’, *The Conversation* (online), 22 April 2014 <<https://theconversation.com/treatment-or-punishment-chemical-castration-of-child-sex-offenders-25495>>.

diminution was the result of new techniques of social control.<sup>43</sup> Whatever the cause, corporeal punishments are now a relatively distant memory. Chemical castration is a sole survivor of that category. Its increasing popularity is an incongruent regression in punishment techniques. Quite apart from its questionable consistency with human rights and dignity,<sup>44</sup> and despite its increasing use, empirical research suggests that chemical castration is of doubtful efficacy.<sup>45</sup> One study concluded that ‘outcome evaluation research is ... so weak that, were the treatment not so plausible it would have to be regarded as empirically unsupported’.<sup>46</sup>

### III INDETERMINATE DETENTION

The indeterminate sentence is now seen as one of the more useful tools to deal with dangerous sexual offenders.<sup>47</sup> The power to sentence a serious or violent offender to indeterminate detention at the time of sentencing exists in the Northern Territory, Queensland, Tasmania, Victoria, and Western Australia.<sup>48</sup> As noted above, this power was employed to detain Gregory Yates at the expiry of his seven-year sentence for a period at the Governor’s pleasure. Both Queensland and South Australia also have a special indeterminate detention scheme for sexual offenders, which allows the Attorney-General to apply for an order for continuing detention after the term of imprisonment.<sup>49</sup> As Patrick Keyzer and Bernadette McSherry explain, these schemes ‘thus operate in a similar way

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43 See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage Books, first published 1977, 1995 ed) [trans of: *Surveiller et Punir: Naissance de la Prison* (first published 1975)].

44 For a discussion in the United States context, see John Stinneford, ‘Incapacitation through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity’ (2006) 3 *University of St Thomas Law Journal* 559. In the UK, see Karen Harrison and Bernadette Rainey, ‘Suppressing Human Rights? A Rights-based Approach to the Use of Pharmacotherapy with Sex Offenders’ (2009) 29 *Legal Studies* 47.

45 Niklas Långström et al, ‘Preventing Sexual Abusers of Children from Reoffending: Systematic Review of Medical and Psychological Interventions’ (2013) 347 *British Medical Journal* 1.

46 Marnie Rice and Grant Harris, ‘Is Androgen Deprivation Therapy Effective in the Treatment of Sex Offenders?’ (2011) 17 *Psychology, Public Policy, and Law* 315, 326.

47 In recent years, indeterminate sentences and preventative detention has increasingly been applied to suspected terrorists. See, eg, Claire Macken, *Counter-Terrorism and the Detention of Suspected Terrorists: Preventive Detention and International Human Rights Law* (Routledge, 2011); Svetlana Tyulkina and George Williams, ‘Preventative Detention Orders in Australia’ (2015) 38 *University of New South Wales Law Journal* 738. As this article considers the treatment of dangerous sexual offenders, the use of indeterminate detention on suspected terrorists is outside its scope.

48 *Sentencing Act 1995* (NT) s 65; *Penalties and Sentences Act 1992* (Qld) s 163; *Sentencing Act 1997* (Tas) s 19; *Sentencing Act 1991* (Vic) s 18A; *Sentencing Act 1995* (WA) s 98.

49 *Criminal Law Amendment Act 1945* (Qld) s 18; *Criminal Law (Sentencing) Act 1988* (SA) s 23.

to post-sentence continuing detention schemes<sup>50</sup>, which exist in Queensland, Western Australia, New South Wales, Victoria, and the Northern Territory.<sup>51</sup>

The emergence of post-sentence continuing detention regimes reveals the preventative rationale behind indeterminate detention. History suggests, however, that originally its justification was quite different. The purposes underlying indeterminate sentences were progressive: rather than a blunt instrument designed to punish the offender or protect the community, an indeterminate sentence was seen as a mark of leniency – within prescribed statutory limits, an offender could be released earlier than they might have been had they been given a finite sentence.<sup>52</sup>

### A As a Means of Facilitating Rehabilitation

The indeterminate sentence was first developed on Norfolk Island in 1840 as a means of incentivising prisoners to good conduct and mitigating the depraved conditions of that penal colony. Indeed, prisoners on Norfolk Island would draw straws to choose a murderer and his victim, while the other participants would stand as witnesses. The whole party, including the accused, would then be transferred to Sydney for the trial, where they would hope to escape.<sup>53</sup> So common were such events that witnesses in those trials had seen so many men ‘cut up like hogs by a butcher’ that they could not necessarily remember the one in question. One group of escapees, faced with starvation, reportedly turned to cannibalism rather than return to the conditions on the island. In those desperate circumstances, a system of indeterminate sentencing was introduced whereby prisoners would be granted marks for good behaviour, which could be the subject of fines for further offences, and with which they might eventually purchase their freedom. The purpose, according to its architect, was ‘to place the prisoner’s fate in his own hands’ such that ‘the state of slavery might be obviated’.<sup>54</sup> That system then found its way into English and Irish law, where it developed to allow prisoners to purchase a range of modest luxuries and freedoms, including less oppressive conditions of incarceration and ultimately something akin to supervised parole, albeit in a prisoners’ village.<sup>55</sup>

In the early and mid-1900s, each Australian state, as well as New Zealand and the United Kingdom, developed provisions which allowed for certain

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50 Patrick Keyzer and Bernadette McSherry, ‘The Preventive Detention of Sex Offenders: Law and Practice’ (2015) 38 *University of New South Wales Law Journal* 792, 795.

51 *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders Act 2013* (NT); *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Dangerous Sexual Offenders Act 2006* (WA).

52 See Mary Daunt-Fear, ‘Habitual Criminals and the Indeterminate Sentence’ (1969) 3 *Adelaide Law Review* 335, 337. As this history demonstrates however, indeterminate sentences were ultimately seen to be disproportionate and intrusive, rather than progressive and rehabilitative.

53 Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press, 2010) 206.

54 Frederick Howard Wines, *Punishment and Reformation: An Historical Sketch of the Rise of the Penitentiary System* (Swan Sonnenschein, 1895) 185–7.

55 *Ibid* 188–91. See also Edward Lindsey, ‘Historical Sketch of the Indeterminate Sentence and Parole System’ (1925) 16 *Journal of the American Institute of Criminal Law and Criminology* 9, 12.



prisoners to be detained at the Governor's pleasure, in addition to or in substitution for a finite sentence.<sup>56</sup> These were not confined to sexual offenders, but rather focused on the 'habitual' nature of offending. Some of these required reports from two medical practitioners to establish a lack of control over sexual instincts and a conviction for a sexual offence,<sup>57</sup> although not necessarily one that involved violence.<sup>58</sup> Others did not require any particular conviction, but rather conferred a broader power requiring only that the sentencing judge have regard to the antecedents, character, age, health and mental condition of the person.<sup>59</sup> In the United Kingdom, preventative detention 'at her Majesty's pleasure' became available for between 5 and 10 years in 1908,<sup>60</sup> and was increased to 5 to 14 years four decades later.<sup>61</sup> Progressive stages of release were abolished in 1967, and indeterminate preventative sentences were reserved for offenders who had served substantial terms rather than those who had served a number of short terms.<sup>62</sup>

The line of indeterminate sentencing regimes for sexual offenders existed alongside the habitual criminal legislation and appears to have commenced in Victoria in 1907. The Victorian *Indeterminate Sentences Act 1907* served as the basis of similar provisions introduced in Western Australia in 1918.<sup>63</sup> That the primary purpose of an indeterminate sentence for sexual offenders was to rehabilitate the offender is illustrated by debates surrounding its introduction in Western Australia. The Attorney-General at the time described the Bill as one which was:

To deal with the amendments of the law relating to offences against morality. The treatment of habitual criminals, the application of indeterminate sentences and the detention in reformatory prisons of offenders other than habitual criminals.<sup>64</sup>

The legislation was to have a reformatory purpose: existing provisions required that the offender have two convictions 'before the reform begins', and there was said to be a greater advantage in 'enabl[ing] the reform to begin before the offender has developed into what is called an habitual criminal'.<sup>65</sup> It was

56 See, eg, *Habitual Criminals Act 1905* (NSW); *Criminal Code Amendment Act 1914* (Qld); *Habitual Criminals Act 1907* (SA); *Indeterminate Sentences Act 1921* (Tas); *Indeterminate Sentences Act 1907* (Vic); *Criminal Code Amendment Act 1911* (WA). See also *Crimes Act 1908* (NZ); *Prevention of Crime Act 1908*, 8 Edw 7, c 59.

57 See, eg, *Criminal Code 1983* (NT) s 401; *Criminal Law Amendment Act 1945* (Qld) s 18; *Criminal Law (Sentencing) Act 1988* (SA) s 23.

58 See *R v Ruler; Ex parte Minister for Justice and Attorney General* [1970] QWN 44.

59 See, eg, *Criminal Code 1924* (Tas) s 393; *Indeterminate Sentences Act 1907* (Vic) s 5; *Criminal Code Act 1913* (WA) s 662. See also *Criminal Justice Act 1985* (NZ) s 75.

60 *Prevention of Crime Act 1908*, 8 Edw 7, c 59.

61 *Criminal Justice Act 1948*, 11 & 12 Geo 6, c 58, s 21(2).

62 *Criminal Justice Act 1967* (UK) c 80, s 37.

63 *Criminal Code Amendment Act 1918* (WA), inserting *Criminal Code Act 1913* (WA) ss 661–2. See the reference to the Victorian Act in Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 February 1918, 355 (Robert Robinson, Attorney-General), where the Attorney-General said: 'It is proposed to repeal those provisions and to substitute other provisions relating to the indeterminate sentence adopted in the Victorian *Crimes Act* of 1915'.

64 Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 342 (Robert Robinson, Attorney-General).

65 The Bill as presented on that occasion was not materially different to one previously presented, and so he referred (Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 September 1918, 342

further said to serve an economic purpose insofar as ‘the cost of repeatedly imprisoning a prisoner is saved’.<sup>66</sup>

These provisions were partnered with a reform to the parole system, also based on Victorian precedent.<sup>67</sup> Under the *Prisons Act 1903* (WA), there was a system of remission whereby prisoners could receive a discount on their sentence determined largely by their behaviour in gaol.<sup>68</sup> Where the prisoner committed an offence in prison, a period of remission was forfeited.<sup>69</sup> This reinforces the indication that these measures were together concerned, at least in part, with the reformation of offenders rather than uniquely with their punishment.

Under legislation introduced together with the Western Australian regime, specific ‘reformatory prisons’ were established for the detention of habitual criminals.<sup>70</sup> A person detained on an indeterminate sentence could be released on parole for a period of two years and, if of good behaviour, have the sentence annulled.<sup>71</sup> The clear intention was that such sentences be imposed for the good of the prisoner – that he might be released earlier if he reforms than he might otherwise be under a finite sentence.<sup>72</sup> One speaker put it even higher, explaining that ‘[t]he words “during the Governor’s pleasure” cannot increase the sentence’.<sup>73</sup>

That would not be the subsequent experience in other jurisdictions. In New South Wales, Mary Daunton-Fear notes that by the end of 1966 there were 80 offenders in New South Wales prisons who had been declared ‘habitual criminals’. Of these, 73 had been declared following property offences, and seven for crimes against the person: ‘Of the eighty offenders, all but six could have been sentenced to longer terms of imprisonment without reference to the *Habitual Criminals Act 1957*’.<sup>74</sup>

In the first six years of its application, there were apparently only six cases brought under the 1911 version of the Western Australian *Criminal Code*, and the Western Australia Comptroller General of Prisons wrote to the Colonial Secretary seeking to extend the experiment further, for it was ‘too hard to qualify as a habitual prisoner’.<sup>75</sup> The amending Act that followed established the

(Robert Robinson, Attorney-General)) to a previous speech: Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 February 1918, 355 (Robert Robinson, Attorney-General).

66 Western Australia, *Parliamentary Debates*, Legislative Council, 16 October 1918, 639 (Hal Colebatch, Colonial Secretary).

67 Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 October 1918, 568.

68 *Prisons Act 1903* (WA) s 21(8) empowered the Governor to make regulations for the purposes of remissions.

69 *Prisons Act 1903* (WA) s 34 (minor offence – 14 days); s 36(6) (aggravated offence – not more than one year).

70 *Prisons Act Amendment Act 1918* (WA), inserting *Prisons Act 1903* (WA) pt VIA (Reformatory Prisons).

71 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 February 1918, 355 (Robert Robinson, Attorney-General).

72 Western Australia, *Parliamentary Debates*, Legislative Council, 16 October 1918, 639 (Hal Colebatch, Colonial Secretary).

73 Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 October 1918, 568 (Robert Robinson, Attorney-General).

74 Daunton-Fear, above n 52, 343–4.

75 Western Australia, *Parliamentary Debates*, Legislative Council, 16 October 1918, 639 (Hal Colebatch, Colonial Secretary).

Indeterminate Sentences Board ('the Board').<sup>76</sup> Without a case from the Board, the Governor was not to direct the release on probation of any person subject to an indeterminate sentence.<sup>77</sup> The Board was empowered to permit a person serving an indeterminate sentence to be released temporarily 'in order to test the reform of such person' prior to release on probation,<sup>78</sup> or on compassionate grounds.<sup>79</sup> It was contemplated that the Board would be staffed by 'broad-minded, sympathetic, sensible people' who 'have reform at heart'.<sup>80</sup> The Attorney-General explained further:

I am not going to be a party to the liberation for experimental purposes of dangerous criminals, but I am willing to be a party to dealing with those men in such a fashion that we may be able to set them up again in life as honest citizens. That is the object of the Bill, but ... give us a harsh Comptroller who says, 'No, let the fellows stay in gaol,' and we reach a deadlock. I would not have such a Comptroller.<sup>81</sup>

Those provisions were repealed in 1963 and the Parole Board substituted for the Indeterminate Sentences Board.<sup>82</sup> With that came the system of probation and parole as a means of dealing with offenders. Prior to this, there was no system of parole, and so the indeterminate sentences filled that function to a certain extent by allowing a shorter finite sentence to be imposed, or no finite sentence at all to be imposed, and thereafter the release of the prisoner to be determined by an executive body with reference to their reform. With the abolition of the Indefinite Sentences Board and the introduction of the system of parole, there was no longer any way that indeterminate sentences could logically retain such a function. It was also around that time that indeterminate sentences were made available specifically for sexual offenders, although the more general provisions, which largely disappeared by the mid-1960s, had been overwhelmingly used for that category of offender in any event.<sup>83</sup>

Of course, many systems of preventative detention still consider the extent of the offender's rehabilitation in determining when is the appropriate time for release. For example, in New South Wales, a judge may declare that a person over the age of 25, who has served at least two separate terms of imprisonment as a consequence of convictions for indictable offences, is a habitual criminal.<sup>84</sup> Upon this declaration the judge is to impose a sentence of imprisonment between 5 and 14 years, to be served concurrently with any other sentence currently being served.<sup>85</sup> The legislation provides that in determining whether to make a

76 *Prisons Act Amendment Act 1918* (WA) s 64E(1).

77 *Prisons Act Amendment Act 1918* (WA) s 64G(1).

78 *Prisons Act Amendment Act 1918* (WA) s 64H(1).

79 *Prisons Act Amendment Act 1918* (WA) s 64K(1).

80 Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 October 1918, 570 (Robert Robinson, Attorney-General).

81 *Ibid.*

82 *Offenders Probation and Parole Act 1963* (WA).

83 See John Pratt, *Governing the Dangerous: Dangerousness, Law and Social Change* (Federation Press, 1997) 98.

84 *Habitual Criminals Act 1957* (NSW) s 4. This legislation is now rarely used, though see *Strong v The Queen* (2005) 224 CLR 1 for a recent case concerning such a declaration.

85 *Habitual Criminals Act 1957* (NSW) s 6.

declaration, the judge is to have in mind either the person's reformation or the prevention of crime.<sup>86</sup> Although this suggests that indeterminate sentences are still framed in a positive light for the offender, it seems clear that aiding rehabilitation or facilitating earlier release is not the primary purpose of imposing an additional 14-year sentence. Similar legislation also exists in Western Australia.<sup>87</sup>

Despite their initial promise, indeterminate sentences are no longer generally considered effective at achieving reformatory goals. Indeed, in 1996, the New South Wales Law Reform Commission recommended the abolition of the *Habitual Criminals Act 1957* (NSW), describing the Act as 'archaic' and noting that the beliefs which underpin it 'are no longer appropriate'.<sup>88</sup> In 2008 and 2012, the New South Wales Sentencing Council echoed this recommendation, urging repeal of the law on the basis that 'at best it is a blunt instrument' which 'would not necessarily provide a suitable pathway or incentive for rehabilitation'.<sup>89</sup> Perhaps it is unsurprising then that the legislation has 'fallen into disuse'.<sup>90</sup> as of September 2014, 'no one was being held under this Act and no orders had been made in the past decade'.<sup>91</sup> Considering the inherent risk of disproportionate sentencing that arises from statutory provisions that anticipate future criminal activity, this is a positive development. However, this does not mean that indeterminate detention itself has fallen into disuse, and a shift in rationales underlying their application towards community protection may heighten the risk of disproportionate sentences.

## B As a Preventative and Protective Measure

The use of indeterminate detention for dangerous sexual offenders since the 1990s has had a decidedly more preventative flavour.<sup>92</sup> The move by the New South Wales Government<sup>93</sup> to specifically imprison Gregory Kable is well-known. During his term of imprisonment for the manslaughter of his wife, Kable had written threatening letters to her family and the carers of their children. The Act, which applied specifically to him, was found to be inconsistent with Ch III of the *Constitution* in a decision which gave birth to a line of jurisprudence that would guard the essential characteristics of courts from legislative usurpation –

86 *Habitual Criminals Act 1957* (NSW) s 4.

87 *Criminal Code Act 1913* (WA) ss 400(3)–(4), 401(4)–(6); *Crimes (Serious and Repeat Offenders) Sentencing Act 1992* (WA) sch 2, s 4.

88 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) 232–3 [10.19].

89 New South Wales Sentencing Council, 'Penalties Relating to Sexual Assault Offences in New South Wales' (Report, May 2009) vol 3, 218 [11.47]. See also New South Wales Sentencing Council, 'High-Risk Violent Offenders: Sentencing and Post-custody Management Options' (Report, May 2012) 147 [5.115] (Recommendation 6).

90 New South Wales Sentencing Council, 'Penalties Relating to Sexual Assault Offences', above n 89, 217 [11.46].

91 Freiberg, Donnelly and Gelb, above n 9, 171.

92 Tamara Tulich, 'Post-sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38 *University of New South Wales Law Journal* 823, 827.

93 *Community Protection Act 1994* (NSW).

but not before he was released from his additional six months' imprisonment.<sup>94</sup> The Act detaining Kable was modelled on Victorian legislation enacted four years earlier,<sup>95</sup> aimed at the preventative detention of Gary David, an inmate at Pentridge prison who had threatened to poison the water supply, commit mass murder and kill the State Premier, and who attracted considerable media attention.<sup>96</sup> No constitutional challenge was mounted to that Act and he died in prison three years later.<sup>97</sup>

In view of those constitutional limits, preventative detention has had to take a more measured form.<sup>98</sup> Several states, commencing with the *Dangerous Prisoners (Sexual Offenders) Act 2003* in Queensland, enacted legislation permitting such offenders to be detained as a preventative measure on application of the executive where they posed an unacceptable threat. That legislation, too, was prompted in large part by one man.

In 1989, Dennis Ferguson had been convicted and sentenced to 14 years' imprisonment for the kidnapping and sexual assault of three children in a motel room over three days. At his sentence, his prospects of rehabilitation were described as 'absolutely nil',<sup>99</sup> and that was reflected in his refusal to participate in any rehabilitation while in custody. In 2003, his pending release stimulated substantial community concern.<sup>100</sup> That concern ultimately led to the introduction of preventative detention legislation for dangerous sexual offenders.<sup>101</sup> At its introduction it was said that the previous legislation, which required that the person be 'incapable of exercising proper control over their sexual instincts' due to a curable condition,<sup>102</sup> was 'archaic and out of touch with community standards'.<sup>103</sup> The legislation was passed unopposed and without consideration by

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94 *Kable v DPP (NSW)* (1996) 189 CLR 51. Kable's suit for false imprisonment following that decision was ultimately unsuccessful: *New South Wales v Kable* (2013) 252 CLR 118. Note also that the 'Kable principle' has been diluted over time in subsequent High Court decisions: *Baker v The Queen* (2004) 223 CLR 513; *Knight v Victoria* (2017) 345 ALR 560, discussed below in n 126 and accompanying text.

95 *Community Protection Act 1990* (Vic).

96 For more detail, see Paul Ames Fairall, 'Violent Offenders and Community Protection in Victoria – The Gary David Experience' (1993) 17 *Criminal Law Journal* 40, 40–2.

97 Paul Ames Fairall, 'Imprisonment without Conviction in New South Wales: *Kable v Director of Public Prosecution*' (1995) 17 *Sydney Law Review* 573, 574–5.

98 Cf Hannah Solomons, 'Case Note: *Pollentine v Bleijie: Kable in Pieces*' (2015) 37 *Sydney Law Review* 607, 607.

99 Cited in Bernadette McSherry and Patrick Keyzer, *Sex Offenders and Preventive Detention: Politics, Policy and Practice* (Federation Press, 2009) 7.

100 See, eg, ABC, 'Outcry Greets Paedophile's Release', *The 7.30 Report*, 9 January 2003 (Genevieve Hussey).

101 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). A similar Act was passed in Western Australia after the validity of the Queensland Act was upheld, prompted by community concern about the release of serial rapist Gary Narkle: Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2005, 7148 (Jim McGinty, Attorney-General) (expressly noting that purpose).

102 *Criminal Law Amendment Act 1945* (Qld) s 18(4).

103 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General).

the Scrutiny of Legislation Committee.<sup>104</sup> A number of other states and territories followed suit.<sup>105</sup>

The Queensland Act allows the Attorney-General to apply during the last six months of a prisoner's sentence for a continuing detention or supervision order on release if they are serving a sentence for a sexual offence involving violence or against children.<sup>106</sup> The court must be satisfied before making either of those orders by acceptable, cogent evidence and to a high degree of probability that without them the prisoner would pose a serious danger to the community,<sup>107</sup> based on two independent psychiatric reports.<sup>108</sup> Under section 18 of the *Criminal Law Amendment Act 1945* (Qld), the prisoner may not be released 'until the Governor in Council is satisfied on the report of two medical practitioners that it is expedient to release the offender or prisoner'.<sup>109</sup>

When introduced, it was acknowledged that a deprivation of liberty 'must never be authorised lightly, without reasonable cause based on legitimate grounds'.<sup>110</sup> The Attorney-General said that it would be 'applied to only a small group of prisoners – the most dangerous sex offenders in our prison system'.<sup>111</sup> However, that has not been the experience in the courts. Although the legislation makes clear and the principle of legality demands that the lesser imposition on liberty must be preferred,<sup>112</sup> the Attorney-General has since indicated the view that supervision orders are 'an alternative to custodial detention',<sup>113</sup> and the overwhelming majority of applications have been for detention.<sup>114</sup> Where prisoners are released, it is almost invariably subject to a supervision order with

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104 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, 2518 (Peter Wellington).

105 See *Crimes (Serious Sex Offenders) Act 2006* (NSW); *Serious Sex Offenders Act 2013* (NT); *Criminal Law (Sentencing) Act 1988* (SA) s 23(2a), as amended by *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA); *Dangerous Sexual Offenders Act 2006* (WA). In Victoria, the *Serious Sex Offenders Monitoring Act 2005* (Vic) is more moderate, allowing for continuing monitoring rather than detention.

106 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 5 (read with the Schedule).

107 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 13.

108 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) s 8.

109 *Criminal Law Amendment Act 1945* (Qld) s 18. This was declared constitutional in *Pollentine v Bleijie* (2014) 253 CLR 629.

110 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, 2484 (Rod Welford, Attorney-General).

111 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2003, 5127 (Rod Welford, Attorney-General).

112 *A-G (Qld) v Francis* [2007] 1 Qd R 396, 405 [39] (Keane, Holmes JJA and Dutney J); *A-G (Qld) v Fardon* [2006] QCA 512, [26] (McMurdo P). The WA Supreme Court has taken the same position: *DPP (WA) v Williams* [2007] WASC 95, [53] (McKechnie J); *DPP (WA) v Mangolamara* (2007) 169 A Crim R 379, 389 [63] (Hasluck J). See also the finding that the applicant must demonstrate not only the unacceptable risk, but also that a detention order is more appropriate than supervision: *DPP (WA) v Williams* [2007] WASC 95, [6], [54] (McKechnie J); but see *DPP (WA) v Williams* (2007) 35 WAR 297 (which overturned the Supreme Court decision on other grounds).

113 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, 2485 (Rod Welford, Attorney-General).

114 Michelle Edgely, 'Preventing Crime or Punishing Propensities? A Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia' (2007) 33 *University of Western Australia Law Review* 351, 358.

strict limitations that are ‘zealously policed’.<sup>115</sup> The boundaries of its application have also been gradually articulated: the definitions of ‘against children’ and ‘involving violence’ for example have been restricted by the Court of Appeal to exclude internet offences against police officers posing as children and relatively minor physical assaults.<sup>116</sup>

In 2013, the Queensland Parliament passed amendments strengthening their continuing detention regime. The Act purported to confer on the Attorney-General the power to ensure the indeterminate detention of anyone if she or he was ‘satisfied’ that it is ‘in the public interest’.<sup>117</sup> The person must then be detained until detention is ‘no longer in the public interest’.<sup>118</sup> The courts could only be involved in the case of jurisdictional error – the minimum constitutionally necessary.<sup>119</sup> Conscious of community concern, the Attorney-General explained that the decision to enact the amendments ‘was made following careful consideration with community safety at the forefront of our minds’, noting – once again – that ‘[t]his legislation will be reserved for the worst of the worst’.<sup>120</sup> Like the earlier incarnations, the Attorney-General was thinking of one man, Robert John Fardon, a convicted child sex offender, whose release from preventive custody had been ordered three weeks earlier.<sup>121</sup> Considering the Act was clearly offensive to the separation of powers, it is unsurprising that it was subsequently declared unconstitutional by the Queensland Court of Appeal.<sup>122</sup>

In the popular forum, however, legal objections are rarely regarded as a sufficient answer to the need for preventative detention. State governments have therefore carefully followed the ‘constitutional line’ drawn by the High Court.<sup>123</sup> Most recently, the Victorian Parliament enacted the *Corrections Amendment (Parole) Act 2014* (Vic) to amend the *Corrections Act 1986* (Vic) prohibiting the Parole Board from ordering the release ‘of the prisoner Julian Knight’ unless he is in imminent danger of dying or seriously incapacitated and does not pose a risk to the community.<sup>124</sup> In 1989, Julian Knight was sentenced to life imprisonment with a minimum term of 27 years for 7 counts of murder and 46 counts of

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115 Patrick Keyzer and Ian Coyle, ‘Reintegrating Sex Offenders into the Community: Queensland’s Proposed Reforms’ (2009) 34 *Alternative Law Journal* 27, 27.

116 *Dodge v A-G (Qld)* (2012) 226 A Crim R 31; *Tilbrook v A-G (Qld)* [2012] QCA 279. Special leave to appeal against Dodge was dismissed by the High Court: Transcript of Proceedings, *A-G (Qld) v Dodge* [2013] HCA Trans 132 (6 June 2013).

117 *Criminal Law Amendment Act 1945* (Qld) s 22(1).

118 *Criminal Law Amendment Act 1945* (Qld) ss 22B(1)(b), 22F(1).

119 *Criminal Law Amendment Act 1945* (Qld) ss 22B(1)(b), 19(b), 22K; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

120 Jarrod Bleijie, Attorney-General and Minister for Justice, ‘New Legislation to Protect the Community’ (Media Statement, 16 October 2013).

121 *A-G (Qld) v Fardon* [2013] QSC 264. See further Andrew Trotter and Harry Hobbs, ‘The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie’ (2014) 36 *Sydney Law Review* 1, 28–30.

122 *A-G (Qld) v Lawrence* [2014] 2 Qd R 504.

123 Harry Hobbs, Andrew Lynch and George Williams, ‘The High Court under Chief Justice Robert French’ (2017) 91 *Australian Law Journal* 53, 65; Gabrielle Appleby, ‘The High Court and *Kable*: A Study in Federalism and Rights Protection’ (2014) 40 *Monash University Law Review* 673, 686.

124 *Corrections Act 1986* (Vic) s 74AA.

attempted murder.<sup>125</sup> Despite the ad hominem nature of the Act, in August 2017, Knight's appeal in the High Court was unanimously dismissed.<sup>126</sup> The Court noted that while 'the party-specific nature of legislation can be indicative of the tendency of that legislation to interfere with an exercise of judicial power',<sup>127</sup> that line was not overstepped in this case.

Even if particular legislative provisions are held to be constitutional, indeterminate detention remains problematic in that it is based on an assessment of risk rather than punishment for actual offending.<sup>128</sup> As the Victorian Sentencing Council noted in 2007, the ability of clinicians accurately to predict risk is uncertain. Such schemes unjustifiably limit human rights and due process, and there is a distinct 'lack of evidence to support claims that continuing detention will reduce overall risks to the community'.<sup>129</sup> Research conducted on behalf of the Royal Commission into Institutional Responses to Child Sex Abuse reveals that courts across Australia are far more willing to impose supervision and detention orders at, or close to the time of release, rather than indefinite detention at the time of sentencing.<sup>130</sup> This 'may be due to the heightened sensitivity of enforcement authorities and the courts to the extent and seriousness of sex offending', but it could also be that 'it is more practical, and possibly more legitimate and reliable, to assess the risk of future offending closer to the time of release than when a possibly very long sentence is imposed'.<sup>131</sup> This reduces the risk that an offender will be incarcerated for a disproportionate period. However, it is also a firm illustration that community protection is now the primary concern in preventative detention measures and there is no longer any suggestion that the offender will be better off if he rehabilitates promptly.

#### IV MANDATORY SENTENCING

Another mechanism that has been used to deal with the problem of dangerous sexual offenders is mandatory sentencing. This is not, of course, a

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125 *R v Knight* [1989] VR 705, 710–11 (Hampel J).

126 *Knight v Victoria* (2017) 345 ALR 560. See also Sarah Murray, 'Knight's Watch: Ad Hominem Parole Legislation Hits the High Court' on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (29 August 2017) <<https://auspublaw.org/2017/08/knights-watch/>>.

127 *Knight v Victoria* (2017) 345 ALR 560, 566 [26] (Kiefel CJ and Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

128 See Patrick Keyzer, Cathy Pereira and Stephen Southwood, 'Pre-emptive Imprisonment for Dangerousness in Queensland under the *Dangerous Prisoners (Sexual Offenders) Act 2003*: The Constitutional Issues' (2004) 11 *Psychiatry, Psychology and Law* 244, 247–8; Bernadette McSherry, 'Indefinite and Preventive Detention Legislation: From Caution to an Open Door' (2005) 29 *Criminal Law Journal* 94.

129 Victorian Sentencing Advisory Council, 'High-Risk Offenders: Post-sentence Supervision and Detention' (Final Report, May 2007) 64 [2.5.82]. This view is supported by those with firsthand experience with the operation of Australian preventive detention regimes: Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface' (2013) 2 *International Journal of Criminology and Sociology* 296.

130 Freiberg, Donnelly and Gelb, above n 9, 181–5.

131 *Ibid* 181.



measure confined to sexual offenders.<sup>132</sup> Mandatory sentencing has a long and unsuccessful history in the criminal law. In England, mandatory minimum transportation sentences were available for various offences in the 18<sup>th</sup> and 19<sup>th</sup> centuries. However, Sir James Fitzjames Stephen reports that the ‘capriciously restricted’ nature of the discretion left to judges was ‘to a great extent remedied’ by legislation passed in 1846 that substituted maximum penalties in many of those instances.<sup>133</sup>

The last extensive scheme of mandatory minimum penalties in Australia was introduced in the colony of New South Wales in 1883.<sup>134</sup> It reportedly arose ‘out of a widespread public dissatisfaction with the inadequacy and inequality of sentences pronounced by the courts’.<sup>135</sup> Injustices did not take long to manifest. One woman suffered a mandatory minimum 12 months’ imprisonment after obtaining two shillings on false pretences. Another man was imprisoned for three years for killing a calf that had persistently annoyed his feeding horses. Examples such as these saw the laws labelled ‘grotesquely disproportionate’.<sup>136</sup> Only one year later, judges were permitted to disregard them if they considered a lesser term ‘ought to be awarded’.<sup>137</sup> In a ‘sop to the public and ... hardy legislators’,<sup>138</sup> 1891 laws retained mandatory minimum penalties for *penal servitude* but allowed lesser sentences of *imprisonment* for the same offences.<sup>139</sup> The two were, of course, the same. The absurdity was ‘quietly abandoned’ in 1924.<sup>140</sup>

Mandatory life and death for murder aside,<sup>141</sup> mandatory sentencing regimes in Australia have been relatively rare since Federation. There have been only two significant examples,<sup>142</sup> and both have caused considerable outcry, faced constitutional challenges, and finally been discontinued on the basis that they were unjust. The first was the mandatory terms introduced in Western Australia in 1996 and in the Northern Territory in 1997 for minor property offences,<sup>143</sup>

132 See generally Trotter and Hobbs, ‘The Great Leap Backward’, above n 121, 14–16.

133 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan and Co, 1883) vol 1, 481–2; *Central Criminal Court Act 1846*, 9 & 10 Vict, c 24, s 1.

134 *Criminal Law Amendment Act 1883*, 46 & 47 Vict, c 17.

135 New South Wales, *Parliamentary Debates*, Legislative Council, 20 February 1884, 1883 (William Bede Dalley, Attorney-General).

136 *Ibid* 1896 (William Bede Dalley, Attorney-General).

137 *Criminal Law Amendment Act 1884*, 47 & 48 Vict, c 18, s 1 (commonly cited as *Sentences Mitigation Act*).

138 G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, 2002) 363.

139 *Criminal Law and Evidence Act 1891*, 54 & 55 Vict, c 5. See further *Crimes Act 1900* (NSW) s 442.

140 Woods, above n 138, 363, see also at 357–64; *Crimes Amendment Act 1924* (NSW) s 24(c).

141 See John L Anderson, ‘The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence’ (2012) 35 *University of New South Wales Law Journal* 747, 751–3 for a summary of Australian jurisdictions’ legislative schemes for punishment of murder by life imprisonment. In many cases, the court must fix a non-parole period or make an order as to the minimum period before release unless inappropriate because of specific factors, or an extreme level of culpability.

142 This is not to suggest that these are the only two mandatory sentencing regimes. In 2015, for instance, the Western Australian Parliament enacted legislation imposing mandatory sentences for aggravated home burglary: *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA) s 5(3), inserting *Criminal Code Act 1913* (WA) ss 279(5A), (6A).

143 *Sentencing Act 1995* (NT) s 78A (repealed); *Juvenile Justice Act 1993* (NT) s 53AE (repealed); *Criminal Code Amendment Act (No 2) 1996* (WA) s 5, inserting *Criminal Code 1913* (WA) s 401(4). The

which were repealed in the Northern Territory in 2001 following heavy criticism.<sup>144</sup> The second is the mandatory term of five years with a three-year non-parole period for people smuggling,<sup>145</sup> which was the subject of judicial criticism so substantial<sup>146</sup> that the Commonwealth Attorney-General took the extraordinary step of directing the Commonwealth Director of Public Prosecutions not to prosecute under the provision attracting the mandatory sentence except in certain aggravating circumstances.<sup>147</sup>

The difficulties with mandatory sentencing transcend the injustices associated with any one particular regime. Mandatory sentencing regimes may be constitutionally permissible,<sup>148</sup> but they are an ineffective deterrent mechanism,<sup>149</sup> ‘do not reduce crime and generally operate in such a way that discriminates against certain minority groups’.<sup>150</sup> Therefore, by 2010, when the Queensland Parliament considered whether to introduce mandatory terms of imprisonment for child sex offences, the importance of reserving judicial discretion for the un contemplated case with sufficient mitigating factors was well-known. The Parliament added the proviso, ‘unless there are exceptional circumstances’.<sup>151</sup> In support of that proviso, the then Attorney-General made the astute observation that:

the strength of our legal system must be measured not only by its capacity to imprison those who transgress the law but also by whether it is sufficiently robust and fair so as to guard against injustice that might be visited upon the few.<sup>152</sup>

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constitutionality of these mandatory sentences was unsuccessfully challenged: *Wynbyne v Marshall* (1997) 7 NTLR 97, and special leave to the High Court was also refused, see Transcript of Proceedings, *Wynbyne v Marshall* [1998] HCATrans 191 (21 May 1998).

- 144 *Juvenile Justice Amendment Act (No 2) 2001* (NT); *Sentencing Amendment Act (No 3) 2001* (NT). Cf Western Australia, where the mandatory penalties remain in place and the summary penalties were trebled in 2004: *Criminal Law Amendment (Simple Offences) Act 2004* (WA) s 35(4). For a more detailed criticism of these laws, see Desmond Manderson and Naomi Sharp, ‘Mandatory Sentences and the Constitution: Discretion, Responsibility, and Judicial Process’ (2000) 22 *Sydney Law Review* 585, 586–7.
- 145 *Migration Act 1958* (Cth) s 236B. The constitutionality of these mandatory sentences was unsuccessfully challenged in *Magaming v The Queen* (2013) 252 CLR 381.
- 146 For a fuller survey of sentences and the offenders on which they are imposed, see Andrew Trotter and Matt Garozzo, ‘Mandatory Sentencing for People Smuggling: Issues of Law and Policy’ (2012) 36 *Melbourne University Law Review* 553, 558–63.
- 147 That is, unless the person was a repeat offender or more than a crew member, captain or master of a vessel, or if a death occurred: Commonwealth, *Gazette: Government Notices*, No 35, 5 September 2012, 2318.
- 148 *Magaming v The Queen* (2013) 252 CLR 381.
- 149 Judith Bessant, ‘Australia’s Mandatory Sentencing Laws, Ethnicity and Human Rights’ (2001) 8 *International Journal on Minority and Group Rights* 369, 378. See also the various studies to this effect cited in: Anthony Gray and Gerard Elmore, ‘The Constitutionality of Minimum Mandatory Sentencing Regimes’ (2012) 22 *Journal of Judicial Administration* 37, 38.
- 150 Freiberg, Donnelly and Gelb, above n 9, 189. For further arguments against mandatory sentencing see: Sentencing Advisory Council (Tasmania), ‘Mandatory Sentencing for Serious Sex Offences against Children’ (Report No 7, September 2016) 5–9. See further Law Council of Australia, ‘Policy Discussion Paper on Mandatory Sentencing’ (May 2014).
- 151 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5.
- 152 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 2010, 2309 (Cameron Dick, Attorney-General).

Notwithstanding this sentiment, mandatory sentences have remained a feature of the landscape for sexual offenders. In 2003, Queensland passed legislative amendments to displace, in relation to child sex offenders, the general principle that imprisonment should be a last resort. In 2010, it was provided that except in exceptional circumstances, child sex offenders must serve an actual term of imprisonment. In 2012, as part of a larger move to be tough on crime, the Queensland government introduced mandatory life sentences for certain repeat child sex offences, with a minimum of 20 years without parole.<sup>153</sup> The amendment was sparked by ‘community outrage,’ which ‘continues to be at a high level’.<sup>154</sup> The laws were almost uniformly opposed by the submissions, which highlighted that mandatory sentencing laws are, by their nature, arbitrary and tend to produce injustice.<sup>155</sup> Amongst these were the Supreme Court of Queensland, the Queensland Law Society, the Bar Association of Queensland and several others.<sup>156</sup> The only submission to support the Bill was by a private citizen concerned that ‘we need to take as much precaution as possible to protect our children and grandchildren’.<sup>157</sup> That statement is illustrative of the fear that inspires such laws.

More recently, seeking to respond to concerns surrounding community safety, South Australia, Tasmania and the Commonwealth have flirted with mandatory regimes for child sex offenders. In 2010 the South Australian Parliament debated a Bill to impose mandatory imprisonment of 10 years for child sex offences carrying a maximum period of life imprisonment, and of not less than one-third of the maximum period of imprisonment in all other cases.<sup>158</sup> During debate, a member of the Legislative Council described such offenders in lurid terms; calling them ‘beings of a subhuman category, ... [unfit to] hold a place in the animal kingdom’ and ‘the least rehabilitatable [sic] people’.<sup>159</sup> The Bill, and a similar 2012 Bill,<sup>160</sup> failed to pass.

Early in 2017, the Tasmanian government tabled legislation in Parliament to enforce mandatory minimum gaol time for child sex offenders. The legislation would enact mandatory minimums of four years’ gaol for the crime of rape where a victim is under 17 years; four years’ gaol for maintaining a sexual relationship with a young person where there are aggravating circumstances and rape; three years’ gaol for maintaining a sexual relationship with a young person where there are aggravating circumstances; and two years’ gaol for the crime of sexual intercourse with a young person where there are aggravating

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153 *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld).

154 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Criminal Law (Two Strike Child Sex Offenders) Amendment Bill 2012: Report No 2* (2012) 4–20.

155 *Ibid* 4.

156 *Ibid*.

157 *Ibid* 9.

158 Criminal Law (Sentencing) (Mandatory Imprisonment of Child Sex Offenders) Amendment Bill 2010 (SA) cl 5, proposing to insert div 2B into the *Criminal Law (Sentencing Act) 1988* (SA).

159 South Australia, *Parliamentary Debates*, Legislative Council, 30 June 2010, 533 (Ann Bressington).

160 Criminal Law (Sentencing) (Mandatory Imprisonment of Child Sex Offenders) Amendment Bill 2012 (SA).

circumstances.<sup>161</sup> The proposed changes followed a report of the Tasmanian Sentencing Advisory Council ('SAC'). The SAC's Report recommended that mandatory sentencing not be introduced in Tasmania,<sup>162</sup> but its terms of reference directed it to investigate the implementation of a mandatory minimum regime. As such, although warning that its recommendations 'must be read in light of' its views as to mandatory minimums generally,<sup>163</sup> the SAC was compelled to articulate a sentencing regime. Nonetheless, the SAC reiterated that mandatory minimums create 'unjustified unfairness without achieving its stated aims of deterring offenders and increasing transparency'.<sup>164</sup> The Bill was defeated in the Legislative Council.<sup>165</sup>

Most recently, in September 2017, the federal Coalition Government introduced a Bill to impose mandatory minimum sentences for sexual offences against children.<sup>166</sup> Described as 'the greatest crackdown on paedophilia in a generation',<sup>167</sup> the Explanatory Memorandum articulates the Bill's aim as 'addressing inadequacies in the criminal justice system that result in outcomes that insufficiently punish, deter or rehabilitate offenders'.<sup>168</sup> While these are laudable goals and the criminal justice system may need fine tuning to better realise them, it is difficult to see how mandatory minimum sentences achieve this. As the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Legislation Committee revealed, the Bill would mean that where a 15-year-old and a 17-year-old share sexual images with each other in a consensual relationship, the day the older partner turns 18, they would suddenly be liable to a mandatory five-year sentence.<sup>169</sup> The Labor opposition has pledged to vote against mandatory sentencing, but in doing so is accused of moving to 'allow more paedophiles into the community'.<sup>170</sup> Whether the Bill is enacted in full, these examples demonstrate that, despite criminological evidence indicating that mandatory sentencing regimes are ineffective at deterring crime and the disproportionate effect such sentences have on individuals, they continue to be proposed. Indeed, in April 2017, the Victorian opposition unveiled a plan to

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161 Sentencing Amendment (Mandatory Sentences for Serious Sexual Offences against Children) Bill 2017 (Tas) cls 4, 5, proposing to insert ss 16AA, 16B, 16C into the *Sentencing Act 1997* (Tas).

162 Sentencing Advisory Council (Tasmania), above n 150, 10.

163 *Ibid* 14.

164 *Ibid* vi.

165 Greg Barnes, 'Reason Finally Wins over Cynical, Populist Policy in Parliament', *The Mercury* (online), 26 June 2017 <<http://www.themercury.com.au/news/opinion/reason-finally-wins-over-cynical-populist-policy-in-parliament/news-story/c692ef51e7ce56c64ebf9e4e63780906>>.

166 Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017 (Cth).

167 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 2017, 11294 (Andrew Wallace).

168 Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (Cth) 2.

169 Law Council of Australia, Submission No 5 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017 [Provisions]*, 6 October 2017, 12–13.

170 Claire Bickers, 'Labor Slammed for Opposing Mandatory Jail Time for Paedophiles', *news.com.au* (online), 19 October 2017 <<http://www.news.com.au/national/politics/labor-slammed-for-opposing-mandatory-jail-time-for-paedophiles/news-story/ba1ea8e681eac09b668efb1d41ac31c3>>.

introduce mandatory sentencing for repeat offenders of serious crimes, in what it says will be the ‘toughest measures the state has ever seen’.<sup>171</sup> Just why mandatory sentencing remains alluring for governments will be explored in Part VI.

## V REGISTRATION AND NOTIFICATION

A final method by which legislatures have attempted to deal with community outrage about violent sexual offenders is by mandatory registration and notification. Such regimes have been most prevalent in the United States. Certain discrete statutes authorising the registration of certain classes of criminals first appeared with the advances in transportation in the 1930s.<sup>172</sup> The first generalised registration law was in Florida in 1937, and the first state-wide registration law for sex offenders in California in 1947.<sup>173</sup> However, the explosion of registration laws did not occur until three particular incidents captured the public eye.

First, in 1989, 11-year-old Jacob Wetterling was abducted. Neither his body nor his abductors were ever found, and it could not have been established beyond conjecture that he was sexually abused.<sup>174</sup> Nonetheless, this led to the legislative response of a federal registration law bearing his name that compelled states to adopt a minimum uniform registration law.<sup>175</sup> It was not limited in its terms to those convicted of offences against children.<sup>176</sup> All 50 States obliged.<sup>177</sup>

Second, public sentiment in the United States at the time was further alarmed when in 1994, convicted paedophile Jesse Timmendequas lured Megan Kanka into a house and brutally raped and murdered her.<sup>178</sup> Although Washington had enacted provisions permitting community notification four years earlier, New Jersey went a step further and enacted laws that required it.<sup>179</sup> While the federal minimum guidelines did not require notification, many states then followed with laws making the notification of communities in which sex offenders live

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171 Loretta Florance, ‘Mandatory Sentencing: Opposition Promises to Introduce Victoria’s “Toughest” Ever Penalties’, *ABC News* (online), 11 April 2017 <<http://www.abc.net.au/news/2017-04-11/mandatory-minimum-sentences-victorian-opposition-proposal/8433096>>.

172 Wayne Logan, ‘*Megan’s Law* as a Case Study in Political Stasis’ (2011) 61 *Syracuse Law Review* 371, 374.

173 *Ibid* 375.

174 Christopher King, ‘Sex Offender Registration and Notification Laws at Home and Abroad: Is an International *Megan’s Law* Good Policy?’ (2011) 15 *City University of New York Law Review* 117, 120.

175 *Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act*, Pub L No 103–322, § 170101, 108 Stat 1796 (1994) (codified as amended: 42 USC § 14071 (2006)).

176 Wayne Logan, ‘Criminal Justice Federalism and National Sex Offender Policy’ (2008) 6 *Ohio State Journal of Criminal Law* 51, 66–8.

177 42 USC § 14071 (2006); see further Edward Ra, ‘The Civil Confinement of Sexual Predators: A Delicate Balance’ (2007) 22 *St John’s Journal of Legal Comment* 335, 340–1; King, above n 174, 117; Trevor Jones and Tim Newburn, ‘Policy Convergence, Politics and Comparative Penal Reform: Sex Offender Notification Schemes in the USA and UK’ (2013) 15 *Punishment and Society* 439, 445.

178 For a comprehensive discussion, see: Nadine Strossen and Ernie Allen, ‘*Megan’s Law* and the Protection of the Child in the On-line Age’ (1998) 35 *American Criminal Law Review* 1319.

179 *Megan’s Law*, Pub L No 104–145, 110 Stat 1345 (1996) (codified as amended: 42 USC § 14071 (2006)).

mandatory,<sup>180</sup> a proposal later adopted by federal law.<sup>181</sup> Notification takes place on three tiers according to the level of risk associated with the offender – ranging upwards to include police, school, media, and door-to-door neighbour notification.<sup>182</sup> That scale is determined in relative rather than absolute terms, meaning no real effort is made to discern what the probability of a particular offender reoffending is – only whether their recidivism is more or less likely than another group of offenders.<sup>183</sup> In setting that level, the state is ‘free to rely on hearsay statements to support its assertions and does not need to base its calculations surrounding the underlying offense solely on the facts of conviction’.<sup>184</sup> The state bears an evidential onus, but the burden then shifts to the offender if challenging the level of registration.<sup>185</sup>

Third, in response to the abduction and murder of six-year-old Adam Walsh, Congress passed the *Adam Walsh Child Protection and Safety Act of 2006*. This Act<sup>186</sup> retroactively implemented sweeping reforms to the notification system, broadening its operation to nearly all sex offences, to juveniles and to those residing in external territories, as well as collecting more information<sup>187</sup> and making it more publicly available.<sup>188</sup> It also made failure to register a crime in itself.<sup>189</sup> However, while the implementation deadline was set at 27 July 2011, by April 2014, only 17 States had substantially acceded to the requirements of the Act,<sup>190</sup> apparently because the costs of implementation exceed the fiscal penalty imposed for non-compliance.<sup>191</sup>

Similar registration statutes have been implemented in Australia.<sup>192</sup> In 1989, provisions were enacted in Queensland allowing for orders against child sex offenders incapable of controlling their sexual instincts to report any change of address to police.<sup>193</sup> Failure to do so was an offence punishable by up to six

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180 For an analysis of these laws as a case of legislating out of fear, see Logan, ‘Megan’s Law’, above n 172.

181 King, above n 174, 122.

182 Philip H Witt et al, ‘Sex Offender Risk Assessment and the Law’ (1996) 24 *Journal of Psychiatry & Law* 343, 359–60.

183 Ibid 360–1.

184 *In re GB*, 147 NJ 62, 79 (Handler J) (1996).

185 *Doe v Poritz*, 142 NJ 1, 32 (Wilentz CJ) (1995).

186 Pub L No 109–248, 120 Stat 587; 28 CFR § 72.3 (2006).

187 Specifically, name and aliases; Social Security number; address of each residence, place of employment, and attended school; license plate number and vehicle description; physical description; text of convicted offense; criminal history; current photograph; fingerprints and palm prints; DNA sample; photocopy of an identification card; and any other information required by the Attorney General: 42 USC § 16914 (2006).

188 42 USC §§ 16911, 16914 (2006).

189 18 USC § 2250 (2006).

190 National Conference of State Legislatures, *Adam Walsh Child Protection and Safety Act* (7 May 2014) <<http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx>>.

191 King, above n 174, 128.

192 *Crimes (Child Sex Offenders) Act 2005* (ACT); *Child Protection (Offenders Registration) Act 2000* (NSW); *Child Protection (Offender Reporting and Registration) Act* (NT); *Child Protection (Offender Reporting) Act 2004* (Qld); *Child Sex Offenders Registration Act 2006* (SA); *Community Protection (Offender Reporting) Act 2005* (Tas); *Sex Offenders Registration Act 2004* (Vic); *Community Protection (Offender Reporting) Act 2004* (WA).

193 *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld), inserting *Criminal Law Amendment Act 1945* (Qld) ss 19–21. See also *Child Protection (Offender Reporting) Act 2004* (Qld).

months' imprisonment.<sup>194</sup> The Attorney-General could then inform anyone with 'a legitimate and sufficient interest'.<sup>195</sup> A directive issued by the Director of Public Prosecutions at the time following discussions with the Department of Justice confirmed that such people might include neighbours and employers.<sup>196</sup> Twelve orders were made in the ten years following their introduction.<sup>197</sup> No application had been made for the release of such information.<sup>198</sup> In 1997, a proposal was made for more stringent requirements but never passed.<sup>199</sup> In 1999, those reporting requirements were expanded to cover more information and a longer period of time, and establish the Queensland Community Corrections Board to make determinations as to disclosure.<sup>200</sup> In June 2008, the Queensland Government established an Inter-departmental Working Group which made various recommendations including for the 'controlled disclosure of information about prisoners released on Supervision Orders to the community'.<sup>201</sup> A similar registry exists in Western Australia.<sup>202</sup>

Sex offender registers have also been implemented in Austria, Canada, France, Japan, Ireland, Kenya, Korea and the United Kingdom, although they require less information and are of narrower application.<sup>203</sup> Most require only registration with police, and provide mechanisms for the release of that information where appropriate. Of those countries, only certain Canadian provinces and Korea have a notification system.<sup>204</sup> Proponents of an international *Megan's Law* have been taking various steps towards its implementation from within the United States since 2008.<sup>205</sup>

In Australia, these efforts are marshalled around 'Daniel's Law', named for Daniel Morcombe, a 13-year-old Queensland boy who was abducted while waiting at a bus stop on the Sunshine Coast and murdered by Brett Peter Cowan in 2003, a man who had two previous convictions for child sex offences. Senator

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194 *Criminal Law Amendment Act 1945* (Qld) s 19(8).

195 *Criminal Law Amendment Act 1945* (Qld) s 20(1).

196 Director of Public Prosecutions (Queensland), *Guideline to Crown Prosecutors and Legal Officers of the Office of the Director of Public Prosecutions and Others Acting on My Behalf, Issued by the Director of Public Prosecutions Pursuant to s 11(1)(a) of the Director of Public Prosecutions Act 1984: Regarding Section 19 of the Criminal Law Amendment Act 1945–1989* (Internal Guideline, Queensland Office of the Director of Public Prosecutions, 28 April 1997).

197 Queensland, *Parliamentary Debates*, Legislative Assembly, 10 June 1999, 2473 (Matt Foley, Minister for the Arts, Attorney-General and Minister for Justice).

198 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, 1993 (Matt Foley, Minister for the Arts, Attorney-General and Minister for Justice).

199 Criminal Law (Sex Offenders Reporting) Bill 1997 (Qld).

200 *Criminal Law Amendment Act 1999* (Qld) ss 4–7.

201 Queensland Government, 'A New Public Protection Model for the Management of High Risk Sexual and Violent Offenders' (Review, June 2008) 5 (Recommendation 12: 'That the controlled disclosure of information about prisoners released on Supervision Orders to the community be endorsed. The amount of information disclosed should be dependent upon where the offender is accommodated and the offender's risk profile').

202 *Community Protection (Offender Reporting) Act 2004* (WA) ss 85A–M.

203 King, above n 174, 129. For example, the *Sex Offenders Act 1997* (UK) c 51 requires only those convicted of certain sexual offences to register. They must notify the police of their name and address.

204 King, above n 174, 130.

205 *Ibid* 132–40.

Derryn Hinch and Bruce and Denise Morcombe, Daniel's parents, are continuing to lobby for an online sex offender register.<sup>206</sup> A proposed national sex offender register was rejected by the Council of Australian Governments in 2014, and a Bill introduced in the Northern Territory in 2015 was later withdrawn before debate.<sup>207</sup> Under the Northern Territory Bill, the register would have included a photograph, name, address, physical description, known aliases, and details of the crimes committed by the offender.<sup>208</sup>

The impact of such registers on the ability of offenders to seek employment and conduct their affairs after serving their punishment is well-known. Reviewing a long record of incidents of harassment and assault, in 1997, the US Third Circuit Court of Appeals noted that 'they happen with sufficient frequency and publicity that registrants justifiably live in fear of them'.<sup>209</sup> Indeed, many registrants believe that community notification is 'a far worse punishment than jail ever was'.<sup>210</sup> Registration and notification laws can also lead to mistaken identity. In one instance, a man rumoured to have been a child molester was targeted by neighbours posting signs outside his house and flooding his apartment, forcing him to move out, before it was revealed that his only conviction was for gross indecency some 19 years earlier.<sup>211</sup> Critically, they usually follow automatically upon the conviction of an offender for particular offences without regard to the particular facts of the case.<sup>212</sup> As Lord Bingham said two decades ago:

It would plainly be objectionable if a police force were to adopt a blanket policy of disseminating information about previous offenders regardless of the facts of the individual case or the nature of the previous offending or the risk of further offending.<sup>213</sup>

There are far worse examples. In 2010, a 78-year-old man in California was beaten to death after being mistaken for a sex offender. The victim, Hugh Edwards, had a similar name and age to a registered sex offender.<sup>214</sup>

The problem with community notification regimes is larger than the risk of mistaken identity. Such schemes do little to enhance community safety, and in fact may have negative consequences. Indeed, studies have demonstrated that community notification can reduce the ability of offenders to reintegrate into

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206 Megan Palin, 'This is what an Australian Sex Offender Registry Would Look Like', *news.com.au* (online), 14 June 2017 <<http://www.news.com.au/national/courts-law/this-is-what-an-australian-sex-offender-registry-would-look-like/news-story/37baeb2c18dc3223e98cf46c30f18068>>.

207 'Federal Government Resisting Internal Pressure to Create National Sex Offenders Register', *ABC News* (online), 16 October 2014 <<http://www.abc.net.au/news/2014-10-16/government-resists-pressure-for-national-sex-offender-registry/5817112>>.

208 Sex Offender and Child Homicide Offender Public Website (Daniel's Law) Bill 2015 (NT) cl 3.

209 *E B v Verniero*, 119 F 3d 1077, 1102 (Circuit Judge Stapleton) (3<sup>rd</sup> Cir, 1997).

210 Appellant's Brief in *A A v State of New Jersey*, 384 NJ Super 481 (NJ, 2006), as cited in Sarah Tofte and Jamie Fellner, 'No Easy Answers: Sex Offender Laws in the US' (Report, Human Rights Watch, September 2007) 88.

211 Blacher, above n 38, 918–19.

212 See, eg, *Sex Offenders Registration Act 2004* (Vic) s 62.

213 *R v Chief Constable of the North Wales Police; Ex parte AB* [1997] 3 WLR 724, 733.

214 Associated Press, 'Man Mistaken for Sex Offender, Killed with Bat', *Herald-Tribune* (online), 14 May 2010 <<http://www.heraldtribune.com/news/20100514/man-mistaken-for-sex-offender-killed-with-bat>>.



their community successfully, leading to higher rates of recidivism,<sup>215</sup> while expansive notification requirements may ‘dilute the public’s ability to determine who truly presents the greatest threat to a community, because all offenders listed on the registry appear to be equally dangerous’.<sup>216</sup> Furthermore, even if such laws do not unintentionally identify the victim, ‘there is a very real risk the child victim will be re-traumatised’.<sup>217</sup> Finally, registration and notification laws can distort rational discussion by sparking a ‘punishment frenzy’ within the community.<sup>218</sup>

## VI LESSONS FROM THE PAST

The brief survey above is intended to be illustrative rather than comprehensive. It reveals two points. First, the rise and fall in different criminal justice responses over time – for example, the general decline of corporeal punishment and indeterminate detention as a reformatory technique and the proliferation of post-detention sentencing, registration and notification regimes – underscores a shift in criminological rationales concerning the governance of risk as well as a growing political consciousness around the significance and value of human rights, including both that of the offender and victim. Although criminal justice remains firmly desert-based, its scope now stretches forward in time, seeking to anticipate and prevent future criminal activities.

Second, and particularly problematic when combined with these shifting penological approaches, the novelty of dangerous sexual offences is more perceived than real and the risks that prompt innovative solutions are often severe but isolated incidents. This combination is largely the cause of the modern ‘anti-crime hysteria of unprecedented duration and intensity’.<sup>219</sup> We are a society concerned with the management of future risk and conscious of the especial menace that arises from dangerous sex offenders. Lessons from the past demonstrate, however, that the risk – though real – is almost always exaggerated.

### A Changing Criminal Justice Responses

Over history, rationales behind criminal justice responses to dangerous sexual offenders have shifted, influenced by changing conceptions of the governance of risk and theories of punishment. Indeed, restrictive measures have often come cloaked behind benevolent reasoning. For a time, an indeterminate sentence was

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215 Naomi Freeman, ‘The Public Safety Impact of Community Notification Laws: Rearrest of Convicted Sex Offenders’ (2012) 58 *Crime and Delinquency* 539, 560.

216 Elizabeth Letourneau et al, ‘Effects of South Carolina’s Sex Offender Registration and Notification Policy on Adult Recidivism’ (2010) 21 *Criminal Justice Policy Review* 435, 455.

217 Robert Gosford, ‘Daniel’s Law – A Bad Law Gone for Good’, *Crikey* (online), 7 December 2015 <<https://blogs.crikey.com.au/northern/2015/12/07/daniels-law-a-bad-law-gone-for-good/>>.

218 Carol Ronken and Robyn Lincoln, ‘Deborah’s Law: The Effects of Naming and Shaming on Sex Offenders in Australia’ (2001) 34 *Australian and New Zealand Journal of Criminology* 235, 250.

219 Michael Tonry, ‘Foreword’ in Richard G Wright (ed), *Sex Offender Laws: Failed Policies, New Directions* (Springer Publishing, 2009) ix, ix.

seen as being to the prisoner's advantage. In the example of Gregory Yates discussed above, amongst other factors discussed, the sentencing judge and the majority of the Court of Appeal agreed that 'the benefit that flows, which I think is largely misunderstood, is that instead of having the useless formality of a long term of parole to be served the authorities can fix at the appropriate time the proper period of parole'.<sup>220</sup> Similarly, in the United States, the first wave of 'sexual psychopath' laws, introduced in the 1930s, were predicated on the view that offenders should be clinically treated to remove the risk of reoffending, and based in benevolent philosophies of compulsory treatment for the benefit of the patient offender as well as the community.<sup>221</sup> The source of legislative power was held to be the *parens patriae* jurisdiction arising from the 10<sup>th</sup> Amendment to the *United States Constitution*.<sup>222</sup>

Indeterminate sentences have outlived that rationale. The second wave of sexual psychopath legislation in the United States, which formed in the 1990s, was justified on the basis that 'the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities ... very different than ... under the involuntary treatment act' for mental health patients.<sup>223</sup> In Australia too, the courts started out with optimism about the reformative function of indeterminate sentencing.<sup>224</sup> It did not take long, however, for the courts to reject the notion that prisoners might be indeterminately detained for their own benefit. Of the 20 offenders declared habitual criminals between 1946 and 1963 in South Australia, in only 3 did the sentencing judge express a hope of reform.<sup>225</sup> The High Court later noted that the argument that the provision permitting indeterminate sentences in Western Australia, when first introduced, was intended to 'bring about reform or improvement of such a person was not satisfactorily explained'.<sup>226</sup> The Solicitor-General conceded in argument, and the Court found that 'the section serves no such purpose now'.<sup>227</sup> By the time Queensland passed its preventative detention legislation in 2003, and its enhanced legislation in 2013, it was clear that the

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220 Transcript of Proceedings, *R v Yates* (Supreme Court of Western Australia, Wallace J, 12 February 1987) 119, cited in Director of Public Prosecutions for Western Australia, 'Respondent's Submissions', Submission in *Yates v The Queen*, P21/2012, 11 January 2013, 6 [35]; *Yates v The Queen* (1987) 25 A Crim R 361, 364 (Burt CJ), 369 (Brinsden J).

221 Tamara Rice Lave, 'Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws' (2009) 69 *Louisiana Law Review* 549, 569.

222 *State ex rel Sweezer v Green*, 232 SW 2d 897, 902 (Conkling J) (Mo, 1950). As to the scope of the *parens patriae* jurisdiction arising out of the *United States Constitution* amend XX, see *Commissioner v Alger*, 61 Mass 53, 85 (Shaw CJ) (1851); Alan Swanson, 'Sexual Psychopath Statutes: Summary and Analysis' (1960) 51 *Journal of Criminal Law, Criminology and Police Science* 215, 220.

223 *Young v Weston*, 898 F Supp 744, 746 (Coughenour DCJ) (WD Wash 1995). See also Wash Rev Code § 71.09.010 (1992); Blacher, above n 38, 907.

224 See, eg, *R v Hamilton* (1913) 13 SR (NSW) 651; *R v Murphy* [1923] St R Qd 276.

225 Daunton-Fear, above n 52, 353.

226 *Chester v The Queen* (1988) 165 CLR 611, 617 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

227 *Ibid.*

object was the protection of the community and it did not pretend that the interests of the defendant were at play in any way.<sup>228</sup>

The recognition of this objective was not without practical impact. It followed from these developments that the indeterminate sentencing provisions were not to be generously applied wherever they might be useful, but rather restricted to the rare cases where necessary. The Court of Appeal noted that such a sentence should be imposed ‘only in very exceptional circumstances’ and in circumstances which ‘firmly indicate that the convicted person has shown himself to be a danger to the public’.<sup>229</sup> The High Court in *Chester v The Queen* limited its application further to only ‘crimes of violence (including sexual offences)’.<sup>230</sup> Despite the apparently broad wording of the provision, indeterminate sentences were to ‘be reserved for ... very exceptional cases’<sup>231</sup> where ‘the sentencing judge [is] clearly satisfied by cogent evidence that the convicted person is a constant danger to the community’.<sup>232</sup> That ‘cogent evidence’, after careful and meticulous consideration,<sup>233</sup> must ‘entirely exclude the prospect that by maturation the applicant may moderate his impulsive behaviour’.<sup>234</sup> The High Court has since then reinforced that indefinite sentences are to be imposed only in exceptional cases,<sup>235</sup> and with ‘great care’.<sup>236</sup>

The preventative rationale behind the contemporary use of indeterminate detention regimes is also present in other criminal justice responses. The proliferation of sex offender registration and community notification schemes and chemical castration laws are all justified on the grounds of community protection.<sup>237</sup> In distinction to mandatory sentencing, which seeks to incapacitate the offender entirely, these responses allow some freedom of movement, albeit with significant qualifications. What accounts for this rise in community protection and consequent fall in offender reformation and rehabilitation?

Some scholars have suggested that Ulrich Beck’s notion of the ‘risk society’<sup>238</sup> can help to illuminate this shift in criminal justice responses. These accounts suggest that modern society is ‘increasingly preoccupied with the future

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228 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, 2484–5 (Rod Welford, Attorney-General); Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2003, 5127 (Rod Welford, Attorney-General).

229 *Tunaj v The Queen* [1984] WAR 48, 51 (Burt CJ).

230 (1988) 165 CLR 611, 619 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

231 Ibid 618 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ).

232 Ibid 619 (Mason CJ, Brennan, Deane, Toohey and Gaudron JJ); see reformulation in similar terms by the Court of Appeal of Western Australia in *Gooch v The Queen* (1989) 43 A Crim R 382, 395 (Brinsden J).

233 In relation to *Sentencing Act 1995* (WA) s 98: *Thompson v The Queen* (1999) 165 ALR 219, 224 [18]–[19] (Kirby J).

234 *Gooch v The Queen* (1989) 43 A Crim R 382, 395 (Brinsden J).

235 See *Buckley v The Queen* (2006) 224 ALR 416, 426 [42] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

236 *Pollentine v Bleijie* (2014) 253 CLR 629, 643 [22] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

237 Bill Heberton and Terry Thomas, ‘Sexual Offenders in the Community: Reflections on Problems of Law, Community and Risk Management in the USA, England and Wales’ (1996) 24 *International Journal of the Sociology of Law* 427.

238 Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage Publications, 1992).

(and also with safety), which generates the notion of risk<sup>239</sup> such that ‘fear of crime [is] arguably now a generic feature of modern, developed societies’.<sup>240</sup> These accounts suggest that, as a community, we are more concerned with preventing future dangerous conduct rather than responding to past actions. Indeed, many scholars have identified in the rise of these measures a shift within criminal justice from ‘a past-oriented, desert-based system to a preventive, precautionary or anticipatory means of dealing with offenders’.<sup>241</sup> As Lucia Zedner explains, ‘[t]he logic of risk licenses future-oriented preventative and incapacitative measures justified by the claim that it is possible to determine in advance who poses a risk and in what degree’.<sup>242</sup> The emergence of the ‘risk society’ has significantly altered criminal justice responses generally. In the case of dangerous sexual offenders, however, the shift has been especially striking. This is largely because this class of offender gives rise to particular anxiety and concern.

## B Fear and Panic

The focus of criminal justice on managing future risk causes problems when it comes to dangerous sexual offenders. As our historical survey has demonstrated, criminal justice responses are often prompted by severe but isolated incidents that spark panic throughout the community. Fear has never been a very good legislator.<sup>243</sup> Large populations and the press that feeds them are more inclined to focus on prominent, catastrophic examples rather than the probability of their materialisation.<sup>244</sup> States of fear tend to produce stereotyping of groups of individuals rather than a sound recognition of a continuum of gravity of offenders.<sup>245</sup> In a phenomenon referred to by Cass Sunstein as ‘risk-of-the-month syndrome’, overzealous policies for risk reduction arise out of the use of salient examples, which come readily to mind.<sup>246</sup> These measures are

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239 Anthony Giddens and Christopher Pierson, *Making Sense of Modernity: Conversations with Anthony Giddens* (Stanford University Press, 1998) 209. But see Pat O’Malley, ‘Risk Societies and the Governance of Crime’ in Mark Brown and John Pratt (eds), *Dangerous Offenders: Punishment and Social Order* (Routledge, 2000) 17, 19 for an argument that the risk society dates back to around the end of the 18<sup>th</sup> century.

240 Wendy Hollway and Tony Jefferson, ‘The Risk Society in an Age of Anxiety: Situating Fear of Crime’ (1997) 48 *British Journal of Sociology* 255, 256.

241 Freiberg, Donnelly and Gelb, above n 9, 17, citing Justice Mark Weinberg, ‘The Move Towards Pre-emption in the Criminal Law’ (2009) 35 *Monash University Law Review* 25; Lucia Zedner, *Security* (Routledge, 2009).

242 Lucia Zedner, ‘Fixing the Future? The Pre-emptive Turn in Criminal Justice’ in Bernadette McSherry and Alan Norrie (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 35, 35.

243 See generally Catherine Carpenter, ‘Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country’ (2010) 58 *Buffalo Law Review* 1.

244 Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge University Press, 2005) 74.

245 *Ibid* 209.

246 Cass Sunstein, *Risk and Reason: Safety, Law and the Environment* (Cambridge University Press, 2002) 78–9, 290.

concerned less with the offender and more about managing ‘the fear that many members of the public feel, reasonably or not, in relation to particular groups’.<sup>247</sup>

Sexual offenders inspire a particular sense of fear. Research on public policy attitudes towards sexual offenders consistently demonstrates that sexual offenders are considered the ‘lowest of the low’.<sup>248</sup> One study assessing community reactions to different types of offenders found that while the participants would feel least safe if a murderer moved into their neighbourhood, they expected to feel most angry if a child molester moved in.<sup>249</sup> An empirical study of judicial perceptions of sexual offenders in California and Texas revealed that these attitudes are also found in the judiciary. The judges interviewed saw sexual offenders as fundamentally different from other offenders; as one Californian judge explained, ‘[w]e purposely use *predator* because it connotes something bad versus *offender*’.<sup>250</sup> As Darrin Rogers and Christopher Ferguson have explained:

sex offenders in Western nations fit Giorgio Agamben’s definition of *homo sacer*, originally an ancient Roman concept. *Homo sacer* exists in a space outside the law, where he can be treated in ways that would otherwise be illegal. This arrangement allows society to maintain a sense of order and preservation of moral values.<sup>251</sup>

It is this *sui generis* status that justifies more extreme methods of treatment for sexual offenders, including chemical castration, mandatory sentencing, indeterminate detention and registration and notification regimes. Each has in recent years been applied only or, in particular, to sexual offenders.

However, a wealth of material suggests that sexual offenders are not *sui generis* at all: the incidence of crime is vastly overestimated in most populations,<sup>252</sup> and empirical studies have failed to establish that sexual offenders are any more likely to reoffend than any other class of criminal.<sup>253</sup> While it is hard to assess recidivism rates of sex offenders because such offences frequently go undetected,<sup>254</sup> a comprehensive review of the literature found that ‘sex

247 Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (Routledge, 2014) 3.

248 Michael Griffin and Desirée West, ‘The Lowest of the Low? Addressing the Disparity between Community View, Public Policy, and Treatment Effectiveness for Sex Offenders’ (2006) 30 *Law and Psychology Review* 143.

249 Allison Redlich, ‘Community Notification: Perceptions of Its Effectiveness in Preventing Child Sexual Abuse’ (2002) 10 *Journal of Child Sexual Abuse* 91.

250 Johnny Nhan, Katherine Polzer and Jennifer Ferguson, ‘“More Dangerous than Hitmen”: Judicial Perceptions of Sexual Offenders’ (2012) 5 *International Journal of Criminology and Sociological Theory* 823, 828 (emphasis in original).

251 Darrin Rogers and Christopher Ferguson, ‘Punishment and Rehabilitation Attitudes toward Sex Offenders versus Nonsexual Offenders’ (2011) 20 *Journal of Aggression, Maltreatment and Trauma* 395, 397.

252 See, eg, Robert Kaplan, ‘Cynicism, Crime Prevention and Help for the Victims of Crime’ in Dale Gibson and Janet K Baldwin (eds), *Law in a Cynical Society? Opinion and the Law in the 1980s* (Carswell Legal Publications, 1985) 411, 412.

253 See, eg, Steven Friedland, ‘On Treatment, Punishment, and the Civil Commitment of Sex Offenders’ (1999) 70 *University of Columbia Law Review* 73, 83.

254 R Karl Hanson and Monique T Bussière, ‘Predicting Relapse: A Meta-analysis of Sexual Offender Recidivism Studies’ (1998) 66 *Journal of Consulting and Clinical Psychology* 348, 357.

offenders have low rates of sexual offence recidivism following sentencing',<sup>255</sup> and that recidivism rates for sexual offenders are 'typically lower than for non-sexual violent offenders or property offenders'.<sup>256</sup> Yet, the data does vary greatly; analyses across several different countries reveals recidivism rates between 5 and more than 50 per cent.<sup>257</sup> At best there is a good deal of uncertainty about the probability of reoffending.

Nonetheless, fear and panic pervade discussion around recidivism of sex offenders. At the time of the introduction of *Megan's Law* in the United States, for example, some legislators cited rates of recidivism at 90 per cent without any sound empirical evidence.<sup>258</sup> One detailed empirical analysis of FBI data of reported and prosecuted crime between 1935 and 1955 suggests that the existence of a feared wave of sexual crimes is equivocal at best.<sup>259</sup> A study commissioned by the City of New York appears to have reached similar conclusions.<sup>260</sup> Significant conflicts also existed in the expert reports of the day.<sup>261</sup> After three decades of sexual psychopath legislation in the United States, one writer proclaimed that 'the channels of publicity have been receptive mainly to the rabidly distorted declarations of ill-informed, often hysterical prophets of calamity'.<sup>262</sup>

There is, of course, nothing unusual about legislative reaction to community concern: such is the very function of a representative democracy. And after all, 'public confidence in criminal justice policies and practices is necessary for a well-functioning system'.<sup>263</sup> Problems arise, however, where the concern is irrational, or irrationally large-scale, because it is fuelled by fear rather than by reason. In these circumstances, governments confronted with the need to legislatively quell pandemic fear of one sort or another habitually do so in a

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255 Freiberg, Donnelly and Gelb, above n 9, 170. Karen Gelb, 'Recidivism of Sex Offenders' (Research Paper, Victorian Sentencing Advisory Council, January 2007) 21.

256 Freiberg, Donnelly and Gelb, above n 9, 151.

257 Hanson and Bussière, above n 254, 350–7 (analysing several studies: 13.4 per cent in 4–5 years, not more than 40 per cent in 15–20 years); David Thornton et al, 'Distinguishing and Combining Risks for Sexual and Violent Recidivism' (2003) 989 *Annals of the New York Academy of Sciences* 225 (20 per cent in 10 years). See also Patrick Langan, Erica Schmitt and Matthew Durose, 'Recidivism of Sex Offenders Released from Prison in 1994' (Report, US Department of Justice Office of Justice Programs, November 2003) 1 (517 of 9,691 male sex offenders in 15 States for three full years following their release); cf Donna Schram and Cheryl Darling Milloy, 'Sexually Violent Predators and Civil Commitment' (Report, Washington State Institute for Public Policy, February 1998) 1 (more than half of 61 sex offenders re-arrested and 28 per cent for a sex crime); Denise Lievore, 'Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy' (Australian Institute of Criminology, May 2004). Relatively few studies report a recidivism rate above 20 per cent.

258 King, above n 174, 120.

259 Lave, above n 221, 551–9.

260 W P Beazell, 'The Problem of Sex Offenses in New York City: A Study of Procedure Affecting 2022 Defendants Made by the Staff of the Citizens Committee on the Control of Crime in New York' (Report, 15 February 1939) cited in Lave, above n 221, 559.

261 Lave, above n 221, 560–1.

262 Michael Roche, 'The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence' (1966) 41 *Notre Dame Law Review* 527, 527.

263 Robin Fitzgerald et al, 'How Does the Australian Public View Parole? Results from a National Survey on Public Attitudes Towards Parole and Re-entry' (2016) 40 *Criminal Law Journal* 307, 307.

selective rather than general manner.<sup>264</sup> This is at once effective in easing public concern insofar as it applies exclusively to the feared class of persons,<sup>265</sup> and dangerous insofar as it does not provoke the ordinary political reaction to curtailment of civil liberties of general application. As Sunstein has explained:

If the restrictions are selective, most of the public will not face them, and hence the ordinary political checks on unjustified restrictions are not activated. In these circumstances, public fear of national security risks might well lead to precautions that amount to excessive restrictions on civil liberties.<sup>266</sup>

Such reactionary policies quite often find themselves at irrational heights,<sup>267</sup> as the pandemic fear of certain risks significantly exceed the likelihood of their eventuating. In this sense, such laws run the risk of being overzealous, disproportionate and unjust.

Legislative responses based on over-exaggerated fears also run the risk of being imprecise or inappropriately targeted and thus ineffective. Practitioners in the criminal justice system may be aware of this. In a comprehensive study, Arie Freiberg, Hugh Donnelly and Karen Gelb report that many ancillary or special orders for sexual offenders are ‘infrequently used’.<sup>268</sup> Consistent with the focus on managing community fear and panic rather than responding to the offender, their ‘purpose appears to be more related to the goal of assuaging public concern than with reducing crime’.<sup>269</sup> Such sentencing measures are often ‘symbolic, nominal or rhetorical, and only rarely do they contribute substantially to the safety of the children they purport to protect’.<sup>270</sup> David Garland has described this type of legislative response as an ‘expressive, cathartic [action], undertaken to denounce the crime and reassure the public’, rather than because of any real capacity to control future crime.<sup>271</sup> As Garland explains, in any event, crime control ‘is less important than [the measure’s] immediate ability to enact public sentiment, to provide an instant response, to function as a retaliatory measure that can stand as an achievement in itself’.<sup>272</sup> What Garland, as well as Freiberg, Donnelly and Gelb make clear, is that fear and panic produces extreme legislation that is overzealous, imprecise, disproportionate and unjust, and therefore, not used.

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264 See generally Willem de Lint, ‘Risking Precaution in Two South Australian Serious Offender Initiatives’ (2012) 24 *Current Issues in Criminal Justice* 145, 145–7.

265 According to a newspaper poll in 2005, 78 per cent of respondents supported detention of terrorism suspects and 56 per cent supported such detention without charge for three months: Bernadette McSherry, ‘Sex, Drugs and “Evil” Souls: The Growing Reliance on Preventive Detention Regimes’ (2006) 32 *Monash University Law Review* 237, 267. Similarly, ‘[w]hen members of the public are asked to assess general sentencing levels via representative surveys, between 70 per cent and 80 per cent reply that the sentences given by judges are too lenient’: Kate Warner et al, ‘Measuring Jurors’ Views on Sentencing: Results from the Second Australian Jury Sentencing Study’ (2017) 19 *Punishment & Society* 180, 181.

266 Sunstein, *Laws of Fear*, above n 244, 204–5.

267 Mike Berry et al, ‘Media Coverage and Public Understanding of Sentencing Policy in Relation to Crimes against Children’ (2012) 12 *Criminology and Criminal Justice* 567, 587.

268 Freiberg, Donnelly and Gelb, above n 9, 6.

269 *Ibid* 165.

270 *Ibid* 12.

271 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001) 133.

272 *Ibid*.

### C Dealing with Our Most Dangerous

These general trends can educate legislative and executive attempts at dealing with our most dangerous. It is convenient at this point to enunciate some measures that might assist in avoiding the repetition of the mistakes of the past. These are not intended to be exhaustive but can be grouped under three objectives.

First, a path must be found around the fear and panic that infects criminal policy. Political strategies of ‘penal populism’ and uncompromising and competitive tough-on-crime policies should be avoided.<sup>273</sup> Extreme criminal justice responses are often defended on the basis that they will apply to only a very confined group of ‘the worst of the worst’, but this rarely turns out to be the case. Such legislative mechanisms can become normalised, enabling future politicians to enact increasingly stringent measures.<sup>274</sup> Clearer empirical work on recidivism,<sup>275</sup> risk and dangerousness, and better efforts to engage the community at large with this research may inoculate the public from the worst of penal populism.

Of course, evidence-based policy is neither simple nor as rational as it implies.<sup>276</sup> Despite the increasing emphasis on the value of such evidence,<sup>277</sup> such policies can be as ideologically pre-determined as emotive legislating.<sup>278</sup> In order to ensure the integrity of the evidential basis, there is much to be said for greater investment in research, strengthening of law reform and sentencing advisory councils, and greater connectivity between researchers and policy-makers. Major political parties should also commit not to introduce criminal justice legislation before the proposal and/or Bill has been scrutinised by relevant parliamentary committees. Although the effectiveness of the committee system is difficult to measure,<sup>279</sup> the opportunity for an open dialogue between politicians, community

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273 See, eg, Andrew Trotter and Harry Hobbs, ‘A Historical Perspective on Juvenile Justice Reform in Queensland’ (2014) 38 *Criminal Law Journal* 77, 79; Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Hawkins Press, 2008); Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003); Chris Clarkson and Rod Morgan (eds), *The Politics of Sentencing Reform* (Clarendon Press, 1995).

274 In relation to anti-terrorism laws, see Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-terror Laws in Australia’ (2014) 38 *Melbourne University Law Review* 362.

275 See Lawrence W Sherman et al, ‘Preventing Crime: What Works, What Doesn’t, What’s Promising’ (Research Brief, National Institute of Justice, US Department of Justice, July 1998).

276 Arie Freiberg and W G Carson, ‘The Limits to Evidence-based Policy: Evidence, Emotion and Criminal Justice’ (2010) 69 *Australian Journal of Public Administration* 152.

277 Nick Tilley and Gloria Laycock, ‘Joining up Research, Policy and Practice about Crime’ (2000) 21 *Policy Studies* 213, 213.

278 See, eg, Michael Naughton, “‘Evidence-Based Policy’ and the Government of the Criminal Justice System – Only if the Evidence Fits!” (2005) 25 *Critical Social Policy* 47.

279 In the Commonwealth Parliament, see generally Commonwealth, *Senate Committees and Government Accountability: Proceedings of the Conference to Mark the 40<sup>th</sup> Anniversary of the Senate’s Legislative and General Purpose Standing Committee System*, Parl Paper No 54 (2010). For recent examination of parliamentary scrutiny committees, see: Laura Grenfell and Sarah Moulds, ‘The Role of Committees in Rights Protection in Federal and State Parliaments in Australia’ (2018) 41 *University of New South Wales Law Journal* 40.



members, and researchers should enhance the prospect that any legislative response is tested and informed by evidence.

Second, the machinery of the criminal justice system must be capable of calibrating punishment to the individual offender's history and circumstances. This is not, however, only a question of efficacy. Disproportionate and ineffective sentences fail to do justice to the individual, who should only be punished according to the gravity of the harm inflicted. In this sense, calls for evidence-based policy are also calls for greater attention to the individual offender and their circumstances. Criminal justice responses that target a broad swathe of individuals invariably produce disproportionate and unjust effects. While this is most clearly identifiable under mandatory sentencing regimes, it is also visible in the approach of judges who refuse to impose ancillary or special orders for sexual offenders. Law must be general so as not to single out any individual,<sup>280</sup> but individuals can and should be considered at the sentencing stage. Judicial discretion should be retained.

Third, the use of preventative measures must be strictly confined to what is necessary and not sacrifice liberty out of an abundance of caution for the public. There are, of course, some individuals who after the completion of their sentence continue to pose an unacceptable risk to the community. This may be because they have refused treatment or have otherwise made no attempt to rehabilitate while incarcerated, or that they have made credible threats of harm to persons upon their release.<sup>281</sup> As Peter Marshall has noted, '[i]t is difficult to deny that particularly dangerous offenders should be detained for substantial periods until the risk they pose has reduced',<sup>282</sup> for there is undoubtedly a class of offenders whose certain recidivism renders their unsupervised and unregulated release dangerous. Leroy Hendricks, for example, who famously admitted that nothing short of death would stop him from molesting children.<sup>283</sup>

In these cases, 'extreme' criminal justice responses may be required, but measures must be adopted to ensure such responses are effective, proportionate and humane. To begin with, any post-sentence order should only be imposed at the completion of an offender's sentence. This would exclude the possibility of indefinite detention orders being made at the time of sentencing, where it is highly improbable that an accurate assessment of the individual's risk of future offending could be realised. There should also be a strong presumption against any post-sentence detention order. This presumption should only be rebutted where cogent evidence demonstrates that the individual poses an unacceptable

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280 Lon Fuller, *The Morality of Law* (Yale University Press, 1964) 46.

281 Stephen Morse would include offenders who: (1) have committed at least one serious and violent crime; (2) are consciously aware that they are extremely high risk; and (3) fail to take reasonable steps to prevent causing future harm: Stephen J Morse, 'Blame and Danger: An Essay on Preventive Detention' (1996) 76 *Boston University Law Review* 113, 152–4. See Thomas Søbirk Petersen, '(Neuro)predictions, Dangerousness, and Retributivism' (2014) 18 *Journal of Ethics* 137, 148–50 for a critique of Morse's approach.

282 Peter Marshall, 'An Analysis of Preventive Detention for Serious Offenders' (2007) 13 *Auckland University Law Review* 116, 116.

283 *Kansas v Hendricks*, 521 US 346, 355 (Thomas J) (1997).

risk of future offending to the community. The focus must again be on the individual rather than the class of offender.

Calculation of dangerousness is, of course, inherently problematic. Reviewing the literature, Antony Duff has suggested that any post-sentence preventative detention regime will – at best – achieve a false positive rate of about 50 per cent. That is, ‘the most that seems currently achievable is a rate of two ... people wrongly identified as “dangerous” for every one who is accurately identified’.<sup>284</sup> Or, as Bruce Ennis and Thomas Litwack described in 1974, psychiatric evaluations of future dangerousness is akin to ‘flipping coins in the courtroom’.<sup>285</sup> Cognisant of this risk, any post-detention or supervision regime will require regular periodic review to ensure that the order remains necessary, proportionate, and just. Informed reviews should be conducted at regular intervals.

It will also require attention to the type of preventative order. Supervision arrangements, which impose a lesser interference on an individual, should be preferred to detention. Detention may nonetheless be necessary in some cases, but, as Dennis Baker has explained, the type of detention regime should be considered. Drawing on Antony Duff’s view that public wrongs define our responsibilities as rational agents to our fellow citizens,<sup>286</sup> Baker argues that censure and punishment primarily concern the communication of blame.<sup>287</sup> It is, as Duff notes, ‘an attempt to communicate to the wrong-doer a moral understanding of his wrong-doing; to bring him to recognise his guilt and repent what he has done’.<sup>288</sup> However, this rationale is unavailable for preventative penal detention because ‘[t]he wrongdoer is not blameworthy for any culpable harm doing (*nulla poena sine culpa* – no punishment without fault or without a bad act), because she has not harmed any new parties’.<sup>289</sup> In contrast, civil confinement ‘does not communicate censure and blame’ but treats a person as a risk to the public, and, like quarantining a person with a deadly communicable disease, their incapacitation is limited to the extent that they remain a danger.<sup>290</sup> For the narrow category of person for whom it is necessary, civil confinement targeted at rehabilitation should be preferred to penal confinement concerned with further punishment. Acknowledging that rehabilitation serves as the rationale for these offenders suggests that detention should be operationalised in several ways: it should be non-punitive, and detainees should

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284 R A Duff, ‘Dangerousness and Citizenship’ in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford University Press, 1998) 141, 145.

285 Bruce Ennis and Thomas Litwack, ‘Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom’ (1974) 62 *California Law Review* 693. Some scholars suggest that recent advances in neuroscience can improve the ability to accurately predict future dangerousness. For a review of the literature, see Thomas Nadelhoffer et al, ‘Neuroprediction, Violence, and the Law: Setting the Stage’ (2012) 5 *Neuroethics* 67.

286 R A Duff, ‘Answering for Crime’ (2006) 106 *Proceedings of the Aristotelian Society* 87, 94.

287 Dennis Baker, ‘Punishment without a Crime: Is Preventive Detention Reconcilable with Justice?’ (2009) 34 *Australian Journal of Legal Philosophy* 120, 130.

288 R A Duff, *Trials and Punishment* (Cambridge University Press, 1986) 70.

289 Baker, above n 287, 131 (emphasis altered).

290 *Ibid* 132–3.

have a right to treatment.<sup>291</sup> As above, regular periodic review should ensure that civil confinement continues only while it remains justified.

The use of informed periodic reviews is essential if a rigorous scheme that protects the community and does justice to the offender is to be designed and implemented. However, a number of points should be considered. First, as noted above, empirical reviews of risk assessment instruments suggest that they should not be used as the sole determinant of continued detention.<sup>292</sup> While both actuarial and clinical approaches to risk assessment are relevant and useful, they should form one element in a matrix of factors that determines any post-sentencing regime. Consistent with an individualised focus on the offender, other factors could include the nature and characteristics of the offences carried out, and the offender's commitment to rehabilitation as measured through concrete actions while in detention. Second, consistent with international human rights law jurisprudence relating to continued detention, reviews should be conducted by an independent court or tribunal, rather than delegated to the executive via a Parole Board or left to the Governor's prerogative.<sup>293</sup> In their sentencing function, judges are trained to evaluate and measure. While the initial sentence in part represents retribution and deterrence, 'judicial monitoring of dangerousness' as John Anderson explains, better accords with the non-punitive nature of civil confinement.<sup>294</sup> Prediction of future offending or dangerousness will never be completely accurate, but the judiciary is best placed to determine when the matrix of factors suggests a post-sentencing regime is necessary. Finally, as noted above, the inherent difficulty in measuring future dangerousness suggests that reviews should be conducted at reasonable intervals. Reasonableness is inherently elastic to allow the regularity of reviews to be informed by the confidence of the risk assessments made by the forensic psychiatrists and psychologists. Nonetheless, as a rights-protective measure, at a minimum, reviews should be conducted within the first 6 months of a detention order, and thereafter at intervals of no more than 12 months.<sup>295</sup>

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291 Paul Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114 *Harvard Law Review* 1429, 1454–5.

292 See above nn 284–5 and accompanying text. See also Seena Fazel et al, 'Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24 827 People: Systematic Review and Meta-analysis' (2012) 345 *British Medical Journal* 1; Stephen Hart, Christine Michie and David Cooke, 'Precision of Actuarial Risk Assessment Instruments: Evaluating the "Margins of Error" of Group v Individual Predictions of Violence' (2007) 190 *British Journal of Psychiatry* 60.

293 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, 112<sup>th</sup> sess, UN Doc CCPR/C/GC/35 (16 December 2014) [15].

294 John L Anderson, "'Indefinite, Inhumane, Inequitable" – The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda' (2006) 29 *University of New South Wales Law Journal* 139, 159.

295 In Victoria, for example, detention orders are reviewed initially within 12 months, and at intervals of no more than 12 months thereafter: *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 66(1).

## VII CONCLUSION

It is more difficult to find an appropriate balance than to criticise existing regimes. Perhaps that is why legislative schemes have been ‘cyclical, falling in and out of favour in response to community concerns and governmental “law and order” policies’.<sup>296</sup> Of course, there must be a role for prevention in any criminal justice system. Any system that is based too heavily on fear of future offending, however, loses sight of the need to promote liberty and punish crimes rather than tendencies. The practical difficulty with ‘the vagaries of risk assessment’, inherent in contemporary criminal justice responses to dangerous sexual offenders, can easily slip into disproportionate and unjust punishment.<sup>297</sup> This has long been recognised. As Leon Radzinowicz explained in 1945, efforts to ensure better protection of society can quickly become instruments ‘of social aggression and weaken the basic principle of individual liberty’.<sup>298</sup> Dangerous sexual offenders evoke a particular type of anxiety. The fear and panic that is sparked by extreme yet isolated incidents often lead to extreme criminal justice responses. The rise in chemical castration, the proliferation of mandatory minimum sentencing, and the increasingly elaborate post-sentence detention, supervision, registration and notification regimes, among others, may sate community concern, but as history shows, they are often overzealous, imprecise, disproportionate or unjust. Measures designed to deal with our most dangerous should be designed with lessons from this history in mind.

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296 Keyzer and McSherry, ‘The Preventive Detention of Sex Offenders’, above n 50, 792.

297 McSherry, ‘Sex, Drugs and “Evil” Souls’, above n 265, 272–3.

298 L Radzinowicz, ‘The Persistent Offender’ in L Radzinowicz and J W C Turner (eds), *The Modern Approach to Criminal Law* (Macmillan, 1945) 162, 167, cited in *Pollentine v Bleijie* (2014) 253 CLR 629, 643 [22] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).