Lecture

SENTENCING: ART OR SCIENCE*

A Personal View

The Right Honourable Sir Anthony **HOOPER**
Lord Justice of Appeal (retired) (England and Wales);
Judicial Fellow, Judicial Institute of University College (London).

1 The question I am here to address is a question tackled as long ago as the 13th century by Thomas Aquinas. He answered the question by classifying the process of sentencing as an art as opposed to science. He likened the sentencer to an architect who determines in what style a house should be built, subject to various constraints.

2 If sentencing is a pure art, the judge would be applying his or her creative skills to determine the appropriate sentence. There could never be a "right" sentence in the same way as there can never be a "right" work of art or a "right" poem. The only "right" sentence for any individual defendant would be the one chosen, hopefully after reflection, by the trial judge. That would be the "right" sentence. How could there be an appeal from a necessarily "right" sentence?

3 Painters and poets (I hope) enjoy painting and writing poetry and, one hopes, they like the painting or poem they produce. Of course, they may change their mind later and choose to destroy the painting or poem, at least if they still own it – not a choice available to the sentencing judge, at least, unless he exercises it very quickly after passing sentence.

4 Do judges, like painters and poets, enjoy sentencing? They probably like the sentences they pass but do they enjoy passing sentence?

5 Many judges do not enjoy sentencing – I certainly did not enjoy sentencing and often sentenced or dealt with sentencing appeals reluctantly. I suppose I tried to reach a sentence which would neither be decreased or increased by the appellate court. I remember judges whose sentences were regularly appealed by defendants (and were proud of it) – leading to the apocryphal response of the appellate court to counsel saying "This is an appeal from the decision of His Honour Judge *X*", to which the Presiding Judge would say: "And what is you second ground?"

---

* This was the keynote address delivered at the Sentencing Conference 2014: Trends, Tools and Technology (9 October 2014, Singapore), jointly organised by the Singapore Academy of Law and the State Courts of Singapore.

But are there judges who enjoy sentencing? I shall refrain from asking for a show of hands – and even if I did ask for a show of hands, I wonder whether I would get a truthful response.

6 But if anyone can tell me why some judges sentence more harshly or more leniently than the average, I would be grateful. I suspect that those who regularly sentence more harshly have a greater confidence in the value of punishment and deterrence, and have a greater belief in "free will", than the judges who are more lenient. I suspect that those who sentence more harshly, whilst paying lip service to rehabilitation, consciously or unconsciously, believe in passing sentences of such a length that rehabilitation is not likely to occur. I also suspect that the more lenient, whilst having empathy for the victim, if there is one, probably have an empathy for the defendant not shared by those who regularly sentence harshly. Perhaps the advances in neuroscience will let us know the answer to my question.

7 Marcel Berlins, the acclaimed legal journalist, wrote this of a 19th century judge, whom he described as one of the last of the "hanging judges":[1]

> We don't have hanging judges today. There are, to be sure, judges who support the death penalty and would be prepared to impose it. But the concept of the hanging judge implied more than mere support for capital punishment. It meant an unwavering belief in 'an eye for an eye', a refusal to accept that the act of killing could have any mitigating circumstances, an enthusiasm for putting on the black cap before announcing an imminent execution, and an element of sadistic pleasure in ordering a fellow human being's death.

8 My anecdotal experiences tell me that some judges enjoy sentencing. Sitting at lunch in various Crown Court centres around England, I often felt that some judges had enjoyed the sentences which they had passed in the morning and looked forward to the sentences which they would be passing in the afternoon. On occasions if a judge said he was going to pass a sentence of x years, others would suggest, with what seemed to me to be some relish, that $x+y$ was the "right" sentence.

9 I remember sitting as a newly-appointed High Court judge in a court centre in England. My list of cases ran short and I offered to take cases from other judges to enable them to finish their lists earlier – it was a Friday! I then had to pass sentence on what I saw as a very vulnerable and disturbed defendant who had pleaded guilty to a charge of arson reckless as to life. I confess to having doubts as to whether the

1 Marcel Berlins, "A Chief Justice Got Away with Murder" *The Independent* (2 August 1998).

defendant had ever actually foreseen the results of what he had done – namely set light to a sofa in his flat in an apartment building. But I have never been of the view that only guilty persons plead guilty. Faced by the prospect of an inevitable verdict of guilty (as his lawyer or cell mate advises) and, in some jurisdictions, by a far higher sentence following a trial, the temptation to "cop a plea", as the Americans call it, must have been very strong.

10 I remember a judge from my days in practice. He was known as "five years B" – he enjoyed the title and lived up to it. At a social event, I asked him why he was known as "five years B". He said that he had been given the name by the Bar because it was thought that the first sentence which he had ever passed on his appointment was five years. He then said with pride that he should have been called "six years B" because the first sentence he had passed on being appointed was one of six years.

11 But back to the case. I concluded that the "right" sentence was one of probation and passed it. On my way to lunch only a few minutes later, I met the judge whose case it had originally been. I do not know how he already knew, but he said to me words to the effect: "I hear you gave him probation. I would have given him five years and I have been upheld twice by the Court of Appeal when I have passed a sentence of five years in cases like this one." Maybe I am wrong, but I felt that I had by my (as I saw it) kind offer of taking the case, denied the judge the pleasure of passing a sentence of five years.

12 Judges, like most painters and poets, may well wish to pass sentences which please the public who read about the case (especially in those jurisdictions in which judges are elected to office). When I started my criminal practice some 40 years ago, there was almost no media criticism of judges and the sentences they passed. That has changed in Britain – there have been occasions when a sentence passed by a judge has led to what I can only call outrageous and often ignorant criticism of the judge, followed even by press intrusion into the judge's domestic and family life. I believe that this has been one of many factors which has led to a harshening of sentences during those 40 years.

13 Whereas a judge, even if he does not enjoy sentencing, will like the sentence he/she has passed, the defendant, as the victim of the sentence, may well not like the sentence imposed upon him because, for example, he believes that he has received a harsher sentence than other defendants in similar circumstances. But if the defendant does not like the sentence for this reason, the victim, like the judge, may like it very much.

14 If the defendant likes the sentence because, say, it is less harsh than other defendants in similar circumstances, the victim may not like the sentence. Of course, victims differ in their views about sentence. I once had to sentence a professional golf instructor man for causing the death of a solicitor by dangerous driving. A sentence of imprisonment was inevitable. The widow told me that her husband had been opposed to imprisonment and that, in honour of her late husband's views (which coincided with her own), I should not pass a sentence of imprisonment. Rightly or wrongly, I passed a sentence of imprisonment reduced by a quarter to reflect the widow's views. Having completed his sentence, the defendant wrote an eloquent, powerful and harrowing book about his experience in prison.[2] Following publication, the defendant was invited by what is now the Judicial College to address judges about his experiences in prison. But making judges hear from ex-prisoners would suggest that there is or should be a scientific aspect to sentencing.

15 I think most of us would agree that it would not be appropriate to give judges the totally free hand to which they would be entitled if sentencing is seen only as an art. Indeed, in the many jurisdictions where the Constitution entrenches the independence of the Judiciary and makes it very difficult to remove judges, allowing judges an unfettered jurisdiction to sentence as they like, could lead to absurd consequences. I am reminded of the Egyptian judge who, a few months ago, sentenced to death more than 1,200 alleged supporters of the ousted President after two very short trials. Albeit that Art 186 of the 2014 Constitution of the Arab Republic of Egypt entrenches the independence of the Judiciary, the judge has recently been removed from sitting in the criminal courts and has been transferred to the civil courts by an appellate court which quashed about 1,000 of the death sentences.

16 So, is sentencing a science? In 1995 Lord Justice Rose, a distinguished judge with huge experience of the criminal justice system in England and Wales, gave an emphatic "no" to that question. He wrote: "Sentencing … can never be a rigid, mechanistic or scientific process."[3]

17 But let us explore the issue.

18 If sentencing is a science, judges would, I suppose, be applying principles drawn from the systematic study of the behaviour of human beings through observation and experiment.

2 John Hoskison, *Inside: One Man's Experience of Prison* (published in 1998 and 2013).

3 Christopher Rose, "Foreword" in *Guideline Judgments Case Compendium* (Sentencing Guidelines Council, 2005).

19 I looked at the third edition of *Sentencing Practice in the Subordinate Courts* to find evidence of a scientific approach by judges here in Singapore and I found it:[4]

> In *PP v Mohamad Noor bin Aris* [2009] SGDC 1, the accused had pleaded guilty to a shoplifting charge of three packets of biscuits valued at $6.00 and a charge of using abusive words towards a police senior staff sergeant in the execution of his duty. He was not sentenced to corrective training but to six months' imprisonment for the first charge of shoplifting and fined $1,500 in default three weeks' imprisonment for the charge of using abusive words towards a public servant. The court took the view that, as the accused could still have at the lowest recidivism rate a 49% probability of criminal re-offending with a 51% probability of not reoffending, the accused should be given a last chance and permitted of his own volition and determination to first reform himself over a reasonable period of time through help from the community agencies without the need for corrective training as he has of his own volition sought to reform and upgrade himself in various ways.

The same approach was adopted in *PP v Azlan bin Abdullah*.[5]

20 I remember praying in aid scientific principles when appearing before a judge who would have been an enthusiastic hanging judge in the sense described by Marcel Berlins, but for the fact that in England, judicial corporal punishment was abolished in 1948 and capital punishment effectively abolished in 1965. I was representing a 16-year-old who was in the Crown Court because there were adults also on the indictment. He had pleaded guilty to aiding and abetting driving whilst disqualified, having voluntarily been in a car with an older driver whom he knew was disqualified from driving. As I started my mitigation a few minutes before 1.00pm, the judge said to me: "I had in mind six months". The judge no doubt thought that this would put me at ease and I would sit down. I did not. I pointed out to the judge that the maximum sentence was six months, a fact of which he seemed unaware. He rose from the bench with his black hat in hand (kept to this day as a ceremonial accoutrement), saying only "Two o'clock". Having taken my wig and gown off, I ran as hard as I could to the local library to find the relevant criminal statistics. When the judge came back into court at 2.00pm, I offered him the criminal statistics which showed that of the 200,000 persons convicted of driving whilst disqualified in a year, only a very small handful had received a sentence of six months' imprisonment. To be fair to the judge, he replied: "You're pushing at an open door, probation".

4 *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2013) at p 36.
5 [2009] SGDC 418.

21 I have said that, if sentencing is a science, judges would be applying principles drawn from the systematic study of the behaviour of human beings through observation and experiment. But judges are often told by the Legislature what they can do and, to that extent, are prevented from adopting a scientific approach.

22 Legislatures often have no hesitation in restricting what judges can do and not do and the judge is obliged to comply with the legislation, whether it be based on scientific principles or not. Thus, judges are restricted from what they can do, and might like to do, by the requirement to pass sentences within a maximum or minimum range or by being required to pass a particular sentence or to pass a consecutive sentence. In England and Wales, for example, murder must be punished by life imprisonment whatever the circumstances, although the courts can mitigate the severity of that by imposing a low minimum term to be served before the defendant is eligible for parole.

23 It may come as a surprise to learn that in the 1990s, four Lord Chief Justices called (during or after their period in office) for the abolition of the mandatory life sentence for murder. Lord Bingham said in 1998[6] whilst Lord Chief Justice:

> It is a cardinal principle of morality, justice and democratic government that an offender guilty of a crime should be sentenced by the court to such penalty as his crime merits, taking account of all the circumstances including the nature of the crime, the circumstances of the offender, the effect of the crime on the victim and the victim's family, the need to prevent the offender from re-offending and deter others from offending in the same way and the need to protect the public.

He went on to say that in the case of murder alone, this principle had quite deliberately been cast aside by Parliament which had enacted that an adult offender convicted of murder should be sentenced to imprisonment for life, whatever the nature of the crime, however strong the mitigating circumstances, whatever the position of the offender, the victim and the victim's family, however minimal the need to prevent the offender from re-offending or to deter others from offending in the same way, and however negligible, on the particular facts, the need to protect the public.

24 Is the requirement of a mandatory sentence of life imprisonment empirically justified? I doubt it. But if we were trying to be more scientific, should not the views of four Lord Chief Justices count for a great deal?

6 Frank Newsam Memorial Lecture (Police Staff College at Bramshill, 13 March 1998).

25 I accept that it is difficult to apply scientific principles to issues of sentencing. Medical researchers into the effectiveness of a new medicine can give the medicine to half of those in the research programme and give the other half placebos, and examine the results. How does a government assess whether some sentence other than the sentence currently required by legislation would achieve the desired effect? Attention could be paid to the experience of other countries. If it was found that in country *A* that a sentence of half the length of the required sentence in country *B* seemed equally effective to reduce crime, I still doubt whether the Legislature in country *B* would reduce the sentence required in *B*. The legislators in *B* would no doubt say that *B* is different, has special problems not found in *A*, *etc*, *etc*.

26 Let me turn to what seems to me to be the greatest obstacle to sentencing being entitled to call itself a science.

27 As the High Court of Singapore stated in *Chua Tiong Tiong v PP*: "There are four pillars of sentencing: retribution, deterrence [general and particular], prevention and rehabilitation. Criminal courts play their part by ensuring that the sentences of offenders mirror these pillars."[7]

28 Words to this effect will be found over and over again in legislation and in decided cases all over the common law world.

29 In the worlds of jurisprudence, moral philosophy, criminology and sociology, the correctness of this proposition is much debated. Utilitarians, for example, dislike retribution and favour deterrence. The heated debate has not shaken the faith of judges and legislatures in the four pillars.

30 Of the four pillars, the greatest obstacle, so it seems to me, to sentencing being entitled to call itself a science, is the pillar of retribution, often described more euphemistically as punishment.

31 What is retribution? *Sentencing Practice in the Subordinate Courts* states:[8]

> The essence of the retributive principle is that the offender must pay for what he has done. The idea is that punishment restores the just order of society which has been disrupted by the offender's crime.

The same book cites the much-quoted judgment of Lord Justice Lawson in the 1974 case of *R v Sargeant*:[9]

7 [2001] 2 SLR(R) 515 at [31].
8 *Sentencing Practice in the Subordinate Courts* (LexisNexis, 2013) at p 121.
9 (1974) 60 Cr App R 74 at 77–78.

> The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.

32 Lord Justice Lawson, in the same case, made the important and often-overlooked point that it is for the sentencing judge to decide which of the four classical principles, as he described them, has the greatest importance in the individual case with which he is dealing.[10]

33 As to Lord Justice Lawson's suggestion that the main duty of the court is to lead public opinion, I do not think that today's tabloid media in Britain would accept this proposition. In the years since 1974, it is the tabloid media which has led and/or formed public opinion and successive governments of the left and the right have legislated to satisfy what I call the dragon of retribution, an insatiable creature demanding longer and longer sentences.

34 There is no doubt that sentences of imprisonment in England and Wales have generally increased over the last 20 years or so, partly due to legislation and partly due to the judges. We have not yet caught up with the US which, in October 2013, was reported as having the highest incarceration rate in the world – 716 per 100,000 of the national population. While the US represents about five per cent of the world's population, it houses around 25 per cent of the world's prisoners.

35 However, some categories of sentences in the UK have been reduced. For example, the impact of the Sentencing Council's guidelines[11] on sentencing drug offences has been to make a significant reduction in sentences on vulnerable "so-called mules" bringing drugs into the UK. Why? Because the guidelines require the sentencer to draw a distinction between various types of courier and pass a lower sentence if the defendant became involved following pressure, coercion, intimidation or became involved because of naivety or exploitation. Although harsh sentences may reduce drug smuggling, there are alternatives. Since 2002, the UK and Jamaica have had an agreement in place pursuant to which extensive screening for drugs of passengers departing from Jamaica to the UK takes place in Jamaica, leading to a considerable reduction in drug smuggling from that country.

10 *R v Sargeant* (1974) 60 Cr App R 74 at 77.

11 *Drug Offences Definitive Guideline* (Sentencing Council of England and Wales, 2012).

36 If a retributive sentence is designed to make the offender pay for what he has done and reflect the abhorrence of the public, it must follow, surely, that retributive sentences must only be used against the guilty. It further follows, that we must ensure that we have in place as good a system as we can design to ensure that only the guilty are convicted, and that there is a procedure by which the innocent wrongly convicted can establish their innocence. The experience of both the UK and the US is that there have been many innocent persons convicted of crimes they did not commit and, in many cases, years have passed before their innocence was established and, in some cases, after their death. It is my view that the greatest weakness in most common law countries, lies in the pre-eminent role given to the police at the investigative stage. When, in Argentina, I explained the role of the police in common law countries, the assembled audience of judges and lawyers burst out laughing. They could not believe it. Civil law countries, such as Argentina, tend to give far greater powers to judges at the pre-trial stage to carry out or supervise the inquisitorial function which we give to the police.

37 Not only must a retributive sentence be used only against the guilty but, to the extent that a sentence can be increased because of aggravating factors, we need to be sure that the necessary findings of fact which justify an uplift are based on evidence and have been proved beyond a reasonable doubt.

38 If a retributive sentence is designed to make the offender pay for what he has done and reflect the abhorrence of the public, it must also follow, surely, that the crimes to which a retributive sentence attaches should require proof of intention, knowledge or subjective recklessness, which I shall call *mens rea*. Negligence should not be sufficient. Yet, over the last 20 years or so, we have seen in England and Wales a significant increase in serious crimes which can be committed negligently or even without any *mens rea* in the sense I am using that word. If the negligent are to be sent to prison (and I have grave doubts whether they should be), then it should not be to punish them.

39 If a retributive sentence is designed to make the offender pay for what he has done and reflect the abhorrence of the public, it must also follow, surely, that retributive sentences must only be used against those who can be said to have "free will" (not, for example, the insane). If we are requiring an offender to pay for what he has done, then surely the sentence for a person whose free will has been compromised by mental illness, addiction, duress or economic circumstances should receive a lesser sentence. Some years ago, the Court of Appeal Criminal Division reduced the sentence for confirmed drug addicts selling drugs only to finance their own consumption. Many now believe that drug addiction should be treated as a health issue and not a criminal issue.

40 According to *The New York Times*, recent empirical research shows that when university students learn about "the neural basis of behavior" – that is the brain activity underlying human actions – they become less supportive of the idea that criminals should be punished. "When genuine choice is deemed impossible, condemnation is less justified."[12] If sentencing is to make any claims to be empirically based, then we must keep surely abreast of developments in neuroscience.

41 Why then is the pillar or principle of retribution, in my view, the greatest obstacle to sentencing being entitled to call itself a science?

42 How can one evaluate something as nebulous as retribution? We know that some draconian punishments which were thought to be just punishment many years ago are now universally thought to be unjust, except perhaps by the Taliban and similar organisations. Likewise, punishments thought in the past to be just when imposed on children and young persons, are no longer so thought. Retribution is not a constant verity. We should accept that it needs revisiting from time to time.

43 The word "draconian" comes from the harsh criminal code for which a 7th century BC Athenian, named Draco, was responsible. Even the most minor crimes were capital. According to Plutarch, when Draco was asked why he had fixed the punishment of death for most offences, he answered that he considered these lesser crimes to deserve it, and he had no greater punishment for more important ones.

44 Sir Samuel Romilly, speaking to the House of Commons on capital punishment in 1810, declared that "[there is] no country on the face of the earth in which there [have] been so many different offences according to law to be punished with death as in England".[13] At its height, the criminal law included some 220 crimes punishable by death, albeit that juries would often bring in logically-impermissible verdicts to avoid the defendant being executed. Many of those laws were no doubt carried to, what were then, the colonies.

45 Another difficulty in taking an empirical approach to retribution, is that international comparisons reveal truly huge discrepancies between different countries and different traditions. Each country tends to think that it is right. In *Tay Kim Kuan v PP*, Yong Pung How CJ stated:[14]

12 Erik Parens, "The Benefits of 'Binocularity'" *The New York Times* (28 September 2014).

13 United Kingdom, House of Commons, *Parliamentary Debates* (9 February 1810) at cols 336–374.

14 [2001] 2 SLR(R) 876 at [10].

> … I have no doubt that the sentencing philosophy of our Legislature has always been to take a tough stand against criminals. We have been described as having one of the strictest and harshest sentencing regimes in the world, but that is something which, albeit paternalistic to some, has nevertheless worked well for us in ensuring that the safety and security of our citizens and the generations after them are never compromised.

Whilst accepting that the Chief Justice may be right, can this assertion be empirically tested?

46 No common law country of which I am aware permits amputation for thieves or death by stoning for adultery – but in a number of countries such penalties are thought to be just punishment. No amount of empirical evidence could persuade those countries that such punishments are wrong. If they are wrong, they are wrong because they offend the prohibition on cruel and unusual punishment to be found in many constitutions. But even that prohibition has been interpreted differently in different countries. I compare the interpretation in the US of the cruel and unusual punishment clause, with the interpretation in those countries signatories to the European Convention on Human Rights, a convention which has been ratified by some 46 countries (including for example Russia and Turkey) and by the European Union.

47 Given that retribution plays such a large part in sentencing, appellate courts or sentencing councils (or similar bodies) have to reflect the retributive element when creating guidelines or grids for an offence. How do they do it? Appellate courts tend to look at decided cases – what sentences have been approved in the past for this offence. Sentencing councils can and do conduct surveys of public opinion. But, both courts and councils will have in mind the seriousness of the offence in relation to other sentences. Unlike Draco, and England until the 19th century, most of us would take the view that acquisitive offences and offences against property are less serious than offences against the person. If so, a lesser sentence should be passed to reflect that fact.

48 When an appellate court or a sentencing council, applying the retributive principle, determines the appropriate level of sentence, should the cost of incarceration and associated costs be a factor taken into account? If a retributive sentence of *x* years costs *y* dollars and if a lesser sentence would cost ¾ *y* dollars, is that relevant? There seems to be little doubt that the length of sentences in the US is being reduced at the present time because of the drive to reduce public expenditure. Taking into account costs requires a more scientific approach to sentencing. But it also means accepting that there may not be an *ideal* appropriate retributive sentence.

49 Let me turn to deterrence, both general and particular. Is the impact of deterrence upon the public at large, or on the individual defendant, any more susceptible to scientific analysis and testing? When I hear statements to the effect that the imposition of such and such a sentence has led to a reduction in serious crime (never its elimination), I am reminded of the story of the man in Trafalgar Square. Asked why he was clapping his hands, the man said: "To keep the elephants away." When told that there were no elephants he replied: "That's because I am clapping my hands."

50 The public cannot be deterred from committing an offence by the sentence imposed for that offence, unless they know that it is an offence and know what the sentence is likely to be – unless, I suppose, they wrongly believe that it is higher than it is. How do we make sure that the public does know, and do we do enough to make sure that they do know?

51 Under the Labour Government between 1997 and 2010, over 3,000 new offences were created, many very serious. It seems unlikely that the majority of the people were aware of the offences, let alone the likely sentences for them. For example, the terrorism legislation has created a serious offence of failing to disclose information which a person knows, or believes might be of material assistance, in preventing the commission by another person of an act of terrorism (defined very widely), or in securing the apprehension, prosecution or conviction of another person, for an offence involving the commission, preparation or instigation of an act of terrorism.[15] This has been used against family members and friends of alleged terrorists – but did they know that the omission to act was an offence? When obligations to disclose are imposed on professionals, for example, by money laundering legislation, their organisations make sure that their members know about it. But how are ordinary members of the public supposed to get to know about such fundamental changes to the law? I say fundamental – because at common law, only rarely is a duty imposed upon person to act.

52 Within a particular jurisdiction, it would be very difficult to persuade the Legislature or the courts or a sentencing council, if there is one, to reduce sentences for a particular offence to see whether the deterrent effect is the same. In my professional lifetime, sentences have on the whole increased. But if the sentence for an offence is increased to obtain a better deterrent effect, how can one tell what effect the increase in sentence from *X* to 2*X* had? If the number of offences goes down, was the reduction caused by the increased sentence or by any of the myriad other possible causes? For example, if the sentence for stealing cars was doubled and the number of offences of stealing cars goes down, is that

15 Terrorism Act 2000 (c 11) (UK) s 38B.

due to the an increase in the sentence (and, if so, would a lesser increase have produced the same result) or is it due to the fact that car manufacturers have made it far more difficult to steal cars?

53 I turn to protection. We cannot know, with any degree of certainty, whether a person kept in prison for the protection of the public at large would have committed offences if he had not been imprisoned. But if we are imprisoning people under the protection principle, then empirical evidence as to the likelihood of a particular offender re-offending would be very helpful and, surely, we should not be totally risk averse. Furthermore, should not those who have served that part of their sentences which reflects the retributive and deterrent elements not be treated in custody in a different manner once the only reason for incarceration is the protection of the public?

54 I shall not deal with "science and rehabilitation" and I shall finish with a few concluding thoughts.

55 Whether, when sentencing, we are punishing, deterring or protecting (or a combination of all three), there are two important overriding principles – proportionality and consistency. We could reduce the offences of unlawful parking or speeding by making them punishable by a significant period in prison, provided that the risk of being caught is more than minimal. But to do so would be disproportionate.

56 We could also have a system where the fines for these offences reflect the income of the defendant and thus, it could be said, act as more of a deterrent to the wealthy. But as Marcel Berlins wrote:[16]

> The last time the [UK] government tried to introduce the principle that fines imposed on offenders should bear some relationship to their income, in 1991, the scheme soon foundered amid general derision. The last straws of the 'unit fines' system, as I remember, came when someone convicted of throwing away an empty crisp packet on a public pavement was fined £1,200 and, in another case, two men fighting, equally to blame, were fined £640 and £64 respectively because they belonged to different income brackets.

Unit fines were abandoned by the Conservative Government in 1993.

57 I turn briefly to consistency. Sentencing must be sufficiently scientific that like cases are treated alike, and unlike cases are not treated the same as cases to which they are not alike. It is, in particular, the role of the appellate courts to ensure consistency and eradicate inconsistency, particularly, if the inconsistency seems to be due to race, religion or

16 Marcel Berlins, "Unit Fines" *The Guardian* (18 January 2005).

other protected characteristics. Empirical evidence can play a role in achieving that.

58 I finish with this observation. Whilst sentencing is not and probably never will be a science, I do believe that the application (with reasons) of broad guidelines issued by a sentencing council or similar body do much to make sentencing a fairer, consistent and more scientific process.
